Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CARROLL MOORE,

Petitioner.

v.

CITY OF ASHEVILLE, NORTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether abstention under *Younger v. Harris* in a First Amendment challenge to a local ordinance that chills speech is appropriate when there are no ongoing state administrative or judicial proceedings and all state proceedings have become final.

2. Whether a federal court is required to abstain under *Younger v. Harris* in a First Amendment challenge to a local ordinance that chills speech when all state proceedings are final, a federal plaintiff has no further rights to appeal in state administrative bodies or state courts, and when all time periods for appeal of the state proceedings have lapsed.

3. Whether abstention under *Younger v. Harris* is appropriate when a plaintiff is cited for violation of a local noise ordinance, pays the fine instead of appealing the citation and institutes a federal court action seeking prospective relief against the enforcement of the ordinance.

PARTIES

The Petitioner is Carroll Moore, an individual and resident of Tuckasegee, North Carolina.

The Respondent is the City of Asheville, North Carolina. Respondents in the District Court also included James L. Westbrook, in his official capacity as the City Manager of Asheville, North Carolina, and the Asheville Police Department. Mr. Westbrook and the Asheville Police Department were dismissed by order of the District Court (App., 39a-40a) and Plaintiff did not appeal their dismissal.

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The opinion of the Court of Appeals (App., 1a - 23a) is reported at 396 F.3d 385. The opinion of the Court of Appeals denying rehearing en banc (App., 42a) is unreported. The opinion of the District Court (App., 24a-41a) is reported at 290 F. Supp. 2d 664.

JURISDICTION

The judgment of the Court of Appeals was filed on January 25, 2005. The Court of Appeals denied rehearing en banc on February 23, 2005. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises issues involving the Free Speech Clause of the First Amendment to the United States Constitution and involving the application of 42 U.S.C. §1983 in the context of abstention under *Younger v. Harris*.

STATEMENT OF THE CASE

Petitioner Carroll Moore, who is employed full time as a carpenter, exercises his sincerely held religious beliefs nearly every weekend by taking to the public sidewalks, parks and plazas throughout North Carolina, to publicly tell others about Jesus Christ. App., 2a, 4a. Moore has engaged in "street preaching" in the City of Asheville and elsewhere throughout the country for the past seven years. App., 4a, 24a. In 2003, while engaged in street preaching, Moore was cited twice for

violating the Asheville Code of Ordinances. App., 2a, 4a.

The first citation was issued on Saturday March 29, 2003. App., 4a. At about 1:00 p.m., Moore began to engage in street preaching near Pritchard Park, on public property, in an area commonly used for public discourse and activities. *Id.* The street preaching was *unamplified*, noncommercial, and made from a fixed location in a non-residentially zoned area. *See* Verified Comp. at ¶29. At that same time, a permitted event was taking place at Pritchard Park. App., 4a. Accordingly, Moore positioned himself just outside the permitted area. *See* Verified Comp. at ¶30. An Asheville police officer approached Moore and told him that he would need to leave the area and go to the sidewalk across the street. App., 5a, 25a. Once across the street from Pritchard Park, Moore began to engage in unamplified street preaching. *Id.* An Asheville police officer then cited him for "street vending or peddling" in violation of the Noise Ordinance in Section 10-84. *Id.* The officer also warned Moore that if he continued to engage in street preaching, the next citation would be a criminal citation. *Id.* At the time the Complaint was issued, Moore was not selling anything or soliciting donations. *See* Verified Comp. at ¶35. Plaintiff paid the $50 fine. App., 5a, 25a.

The second citation was issued on Saturday, April 19, 2003. App., 5a, 25a. At about 1:00 p.m., Moore began to engage in street preaching near the City County Plaza, on public property, in an area commonly used for public discourse and activities. *Id.* The street preaching was unamplified, noncommercial and made from a fixed location in a non-residentially zoned area. *See* Verified Comp. at ¶38. At that same time, a permitted event was taking place in front of City Hall. App., 5a, 25a. Accordingly, Moore positioned himself just outside the permitted area. *Id.* An Asheville police officer issued to Moore a Complaint and Notice of

Civil Penalty for violating Section 10-84's (the Noise Ordinance) prohibition of the "use of any drum, loudspeaker or other instrument or device for the purpose of attracting attention by creation of noise to any performance, show, or sale or display of merchandise." *Id.* The citation required him to pay a $100 fine. *Id.* At the time the citation was issued, Moore was not using any drum, loudspeaker or other instrument or device; rather, Moore was using only his unamplified voice. *See* Verified Comp. at ¶42. Moore timely appealed the citation to the Noise Ordinance Appeals Board pursuant to Asheville Ordinance 10-86. App., 5a, 25a. The Noise Ordinance Appeals Board upheld the citation and Moore paid the $100 fine. *Id.*

Importantly, Code Section 10-87 states:

> Nothing in this article shall be construed to prevent or limit any person from seeking any remedy available in law or equity for activities that are or may be subject to regulation by this chapter, or from pursuing said remedy simultaneously with proceedings under this chapter, nor shall any of the procedures specified herein be a condition precedent to the initiation of any legal action.

After Moore paid the fines, he filed suit in federal court seeking an injunction and declaratory relief and damages for the abridgment of his constitutional rights. App., 6a. At the time of filing the suit, the state proceedings under both citations were final. The city administrative bodies and the state courts were doing nothing related to the Noise Ordinance citations, planned on doing nothing related to those citations nor could they have done anything in the future related to the citations because the citations were completely final at the time of filing the suit. App., 10a. Moore filed suit in order to obtain prospective relief for the future so that he

could once again street preach in the City of Asheville without fear of citation for violating the City's Noise Ordinance. In his lawsuit, Moore challenged Asheville Code §16-4 ("Public Speaking Ordinance"), §§16-113 and 16-116 ("Picketing Ordinances), and §§10-83-10-85 ("Noise Ordinances"). App. 25a-27a. Moore's challenges to these code sections were facial challenges and "as-applied" challenges. App., 25a.

In the Complaint Moore sought an injunction specifying that:

> (1) Defendants allow Plaintiff to engage in street preaching on the public sidewalks, parks, plazas and other public places within the city of Asheville; and
>
> (2) Defendants are enjoined from enforcing the Picketing (§§ 16-113, 16-116), Public Speaking (§ 16-4) and Noise Disturbance Policies (§§ 10-82 through 10-89) so as to prohibit "street preaching" on the public sidewalks, parks, plazas and other public places within the city of Asheville. *See* Verified Complaint at Prayer for Relief.

Moore also sought a Declaration that:

> (1) Defendants' Public Speaking Policy (§ 16-4) invalid on its face insofar as it prohibits all public speaking on the streets, alleys, sidewalks, public squares or any public grounds of the city without first obtaining the written permission of the city manager;

(2) That Defendants, Defendants' officers, agents, employees and other persons acting in active concert with them, unlawfully obstructed Plaintiff from exercising Plaintiff's constitutionally-protected rights;

(3) Defendants' Picketing Policy (§§ 16-113, 16-116) and Noise Disturbance Policy (§§ 10-82 through 10-89) invalid on their face insofar as they are overbroad;

(4) Defendants' Noise Disturbance Policy (§§ 10-82 through 10-89) invalid as applied by Defendants insofar as it prohibits Plaintiff from street preaching on public sidewalks, public plazas and public parks based on the religious content and religious viewpoint of his message.

(A. 25). The thrust and focus of Moore's Complaint was prospective and was geared toward removing the obstacle of the noise ordinance so that he may engage *in the future* in constitutionally-protected speech. Moore's complaint did not seek a declaration from the Court that the state court action was wrong or that it should be reversed or overturned. Moore also did not seek an injunction from the federal court stopping an ongoing proceeding. While Moore's Complaint did contain a damages claim, Moore made clear that the damages claim was solely for nominal damages for vindication of constitutional rights and that the damages claim did not interfere with any ongoing or final state proceedings. *See* Reply Brief to Fourth Circuit at 11-16.

The Defendant's moved to dismiss Moore's Complaint

arguing that the action should be barred under the *Younger* abstention doctrine. App., 28a. Shortly after Plaintiff's lawsuit was filed, the City of Asheville repealed the Public Speaking Ordinance and requested that the District Court dismiss Moore's challenge to that ordinance. App., 36a.

The District Court dismissed Moore's challenges to the Public Speaking Ordinance and the Picketing Ordinance. App., 41a. The District Court held that Moore's challenge to the Noise Ordinance should be stayed under the abstention doctrine announced in *Younger v. Harris*, 401 U.S. 37 (1971). App., 41a. The District Court rejected Moore's argument that there was no longer an ongoing state proceeding because he did not appeal his first citation and ceased pursuing the appeal of the second citation. App. 28a. The District Court believed that *Younger* abstention was proper even though Moore's state proceedings were final and stayed Moore's claims pending the outcome of a state proceeding. *Id.*

Moore appealed to the Fourth Circuit[1] who affirmed the District Court's decision to abstain under *Younger*.[2] The

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[1]The Fourth Circuit held that in spite of the fact that the District Court had stayed Moore's claims, the Circuit Court had jurisdiction to review the order because "the effect of the district court's order to stay, pending the outcome of a state proceeding, effectively ended the litigation in view of the facts that no state court proceedings were pending at the time of the district court's order and the administrative 'judgments' were no longer appealable."

[2]Moore did not appeal the District Court's dismissal of his challenges to the Public Speaking and Picketing ordinances. Therefore, the only issue before the Circuit Court was whether *Younger* abstention of Moore's challenge to the Noise Ordinances was proper. That is likewise the issue presented in this Petition.

Circuit Court found that this Court had extended *Younger* to "completed state proceedings" App., 15a. The Circuit Court recognized that, "It is true that the Supreme Court has not yet held that a federal court should abstain under *Younger* from hearing a federal claim when the plaintiff has failed to exhaust state administrative remedies and defaulted on his opportunity to do so." *Id.* However, the Circuit Court felt that this Court had suggested just such a result in *Huffman v. Pursue*, 420 U.S. 592 (1975) and *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986). The Circuit Court rejected Moore's argument that his Complaint was prospective in nature stating that the Complaint sought to annul the effects of the prior state administrative proceedings to the extent that the Complaint sought to declare the Noise Ordinances unconstitutional as applied to him. App., 21a. The court held that

> To the extent that Moore's complaint looks back on the City's past actions and demands compensation for them, it seeks to annul what has already been determined by two police officers and the Asheville Noise Ordinance Appeals Board. Even though no state proceedings were pending when Moore filed his federal complaint - because he had let the times for appeal lapse - we conclude that his efforts in this case to cast aspersion on state processes and to annul the results of the administrative proceedings were properly barred by the district court under *Younger-Huffman*. App., 22a.

Because the Fourth Circuit's opinion conflicts with its own precedent, precedent from other circuits and from this Court, Moore petitions this Court to review his case to resolve the inter and intra-circuit conflicts on this issue of great public importance.

REASONS FOR GRANTING THE PETITION

I.

THE FOURTH CIRCUIT IN THE PRESENT CASE TOGETHER WITH THE THIRD AND EIGHTH CIRCUITS DIRECTLY CONFLICT WITH DECISIONS FROM THE FIFTH, SIXTH AND ELEVENTH CIRCUITS AS WELL AS A PREVIOUS DECISION FROM THE FOURTH CIRCUIT ON THE APPLICABILITY OF *YOUNGER* ABSTENTION TO STATE PROCEEDINGS THAT ARE FINAL.

The Fourth Circuit's opinion in this case directly conflicts with the Fifth, Sixth and Eleventh Circuits on the issue of whether *Younger* abstention applies to federal plaintiffs whose state proceedings are final. The Third and Eighth Circuits follow the Fourth Circuit's opinion in this case and are also in direct conflict with the Fifth, Sixth and Eleventh Circuits on this issue. This Court should accept review to resolve this clear conflict on an issue of great importance to civil rights plaintiffs.

The Fifth and Sixth Circuits have explicitly held that *Younger* abstention is inappropriate when state proceedings are final, even if a plaintiff did not choose to avail himself of an appeal available to him in a state proceeding. *See Thomas v. Texas State Bd. of Medical Examiners*, 807 F.2d 453 (5th Cir. 1987); *Norfolk & Western Railway Co. v. Public Utilities Comm'n. of Ohio*, 926 F.2d 567 (6th Cir. 1991) (hereafter "*PUCO*"). The Fourth Circuit's decision stands in direct conflict to these precedents.

In *Thomas*, the Fifth Circuit reversed the district court's

application of *Younger* abstention and confirmed the Supreme Court's holding that "exhaustion of state remedies is not required as a prerequisite to §1983 cases...." 807 F.2d at 454. Thomas was a medical doctor who had been convicted of a crime and had his medical license revoked by a state administrative board. *Id.* Dr. Thomas initially sought review of the license revocation in state court, but dismissed the action and brought the federal court challenge. *Id.* The district court abstained under *Younger* reasoning that Dr. Thomas had not availed himself of state court remedies before bringing the federal claim. *Id.* The Fifth Circuit reversed and held that *Younger* abstention was inappropriate because Thomas' case was not pending and the mere availability of a remedy in the state court that Thomas chose not to pursue before coming to federal court was not sufficient to invoke *Younger* abstention. *Id.* While *Younger* is premised on deference to state court proceedings, such deference "is no longer due when the administrative proceedings have ended. The mere availability of state judicial review of state administrative proceedings does not amount to the pendency of state judicial proceedings within the meaning of [*Younger*]." *Id.* at 456. The court went on to state:

> A person who contends that his constitutional rights have been violated by a state administrative proceeding is not required to resort to an appeal to state courts before seeking relief in a federal forum. At the time this suit was filed, no state action was pending. Neither exhaustion of state administrative remedies, which the Supreme Court held unnecessary in *Patsy v. Florida Bd. of Regents*, [457 U.S. 496 (1982)] nor exhaustion of state judicial remedies, which the Court held unnecessary in *Monroe v. Pape*, [365 U.S. 167 (1961)], is a prerequisite to seeking the

> aid of a federal court to enforce federal constitutional rights.

Id. at 456. "When no state proceedings are pending, a federal action does not interfere with or insult state processes and 'the policies on which the *Younger* doctrine is premised have little force.'" *Id* at 457 (quoting *Concerned Citizens of Vicksburg v. Solls*, 567 F.2d 646, 650 (5th Cir. 1978)).[3]

In *Solls*, an unincorporated association sued in federal court attacking the constitutionality of an anti-boycotting statute. *See Solls*, 567 F.2d at 647. The district court in *Solls* abstained under *Younger* because state prosecutions were pending against six of forty-nine plaintiffs at the time of the federal case. *Id.* at 648. The prosecutions were terminated during the pendency of the appeal and the Fifth Circuit reversed, holding that *Younger* abstention was not appropriate because the state proceedings had terminated and were now final. *Id.* The court stated that, "Termination of the six prosecutions eliminated the *Younger* problem in this case, for the policies on which the *Younger* doctrine is premised 'have little force in the absence of a pending state proceeding.'" *Id.* at 650 (quoting *Lake Carriers' Association v. MacMullan*, 406 U.S. 498, 509 (1972)). The Fifth Circuit explained that *Younger* abstention was not appropriate when state proceedings had become final and were not pending at the time of the federal action because:

> As Mr. Justice Rehnquist explained in *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930 [] (1975): The principle underlying *Younger* and *Samuels* (*v. Mackell*, 401

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[3]The Eleventh Circuit follows the Fifth Circuit's reasoning as binding precedent. In *Bonner v. Pritchard*, 661 F.2d 1206 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent, Fifth Circuit cases decided before 1981.

> U.S. 66 [] (1971)) is that state courts are fully competent to adjudicate constitutional claims, and therefore a federal court should, in all but the most exceptional circumstances, refuse to interfere with an ongoing state criminal proceeding. In the absence of such a proceeding, however, as we recognized in *Steffel*, a plaintiff may challenge the constitutionality of the state statute in federal court, assuming he can satisfy the requirements for federal jurisdiction.

Id. at 650. Because the state proceedings had terminated and had become final, abstention under *Younger* was inappropriate. It is equally inappropriate in this case, and the Fourth Circuit's opinion to the contrary must be reviewed to resolve this conflict.

The Sixth Circuit has likewise held that *Younger* abstention is inappropriate when there are no ongoing state proceedings and when any state proceedings have become final. *See PUCO*, 926 F.2d at 567. In *PUCO*, the railway was found to be in violation of an administrative code and filed suit in federal court instead of appealing the determination in state court. *Id.* at 569. The Sixth Circuit rejected the commission's claim that *Younger* abstention should apply because the railroad 's failure to exhaust its state remedies meant the state proceedings were ongoing. *Id.* at 572. "'When no state proceeding is pending, and considerations of equity, comity and federalism are therefore diminished, a federal court may consider constitutional challenges to state statutes and grant declaratory and injunctive relief'." *Id.* (quoting *WXYZ, Inc. v. Hand*, 658 F.2d 420, 423 (6th Cir. 1981)). The court then stated:

> PUCO contends that the state action in this case is still "pending" because the railroad did not exhaust its right of appeal of PUCO's order. However, we think

> there was no "ongoing" or "pending" proceeding at the time the railroad filed suit in the district court. PUCO conducted an administrative hearing and concluded that the railroad was in violation of Rule 4901:3-1-05(D). That was the end of the matter and no further administrative proceedings were contemplated or appeals available to the railroad short of judicial review. . . . This court has acknowledged the distinction between a case wherein a plaintiff seeks to enjoin an ongoing administrative hearing and one wherein a plaintiff seeks judicial relief from the final order of a state agency. . . . In this case, the agency has already conducted a hearing and issued its final order.

Id. at 572-73. Because the agency decision was final, the Sixth Circuit held that *Younger* abstention was inappropriate. This direct conflict with the Fourth Circuit's decision in this case requires review by this Court.

The Fourth Circuit's Opinion also directly conflicts with an earlier Fourth Circuit unpublished opinion in *Sofer v. State of North Carolina Hertford Police Dep't.*, 935 F.2d 1287 (4th Cir. 1991)(unpublished), *available at* 1991 WL 107545. In that case, the court refused to apply *Younger* abstention when state proceedings are final, holding that they are not considered "ongoing" for purposes of *Younger* abstention.

In *Sofer*, Michael and Eve Clark gathered on a sidewalk in Hertford, North Carolina to street preach. *Id.* at *1. They were both arrested by the police for violating a Hertford ordinance which required a permit before any parade, picket or demonstration could be held. *Id.* The Clarks served a full jail sentence for violating the ordinance and sued the police department in federal court alleging that the ordinance violated their First Amendment rights to free speech and

freedom of religion. *Id.* The District Court abstained under *Younger*. On appeal, the Fourth Circuit reversed holding that abstention was inappropriate because there were no ongoing state proceedings. The court very clearly stated:

> The district court's holding was incorrect. Page 7 of the complaint contains a statement signed by both Michael Clark and Eve Clark stating that they have fully completed the jail terms they received for violating the ordinance. No appeal was taken from the state convictions; however, that is not fatal to the present appeal. *See Wooley v. Maynard*, 430 U.S. 705, 711 (1977). Thus it is clear from the face of the complaint that no basis for *Younger* abstention existed. . . The district court should have addressed the merits of this claim. *Id.* at *2.

The same ruling should have been applied to this case. The Fourth Circuit's opinion in the present case stands in stark conflict with the Fifth, Sixth, and Eleventh Circuits and a previous decision from the Fourth Circuit holding that *Younger* abstention is inappropriate when state proceedings are final. This Court must accept review to resolve this conflict.

In contrast, the Third and Eighth Circuits follow the reasoning of the panel opinion in this case. The Third and Eighth Circuits have held opposite to the Fifth, Sixth and Eleventh Circuits and have stated that even when state proceedings are final, if a plaintiff does not pursue all of his state proceedings, including all judicial appeals, then *Younger* abstention is required. *See O'Neill v. City of Philadelphia*, 32 F.3d 785 (3d Cir. 1994); *Alleghany Corp. v. Pomeroy*, 898 F.2d 1314 (8th Cir. 1990).

In *O'Neill*, two individuals sued the City of Philadelphia over the City's process for handling traffic tickets. *O'Neill*, 32

F.3d at 788. At the time of filing the suit, one plaintiff had paid his fines and one plaintiff had not paid his fines. The Third Circuit framed the issue as whether "there is a 'pending' state proceeding inasmuch as O'Neill and Goodman filed their federal lawsuit in lieu of appealing the hearing examiner's determination, and in lieu of raising their constitutional claims in the state forum." *Id.* at 790. The Third Circuit stated, "We have been given no reason why a litigant in a state administrative proceeding should be permitted to forego state-court judicial review of the agency's decision in order to apply for relief in federal court." *Id.* and 790-91. The Court then stated:

> We hold that state proceedings remain 'pending,' within the meaning of *Younger* abstention, in cases such as the one before us, where a coercive administrative proceeding has been initiated by the State in a state forum, where adequate state-court judicial review of the administrative determination is available to the federal claimants, and where the claimants have chosen not to pursue their state court judicial remedies, but have instead sought to invalidate the State's judgment by filing a federal action. *Id.* at 791.

The Eighth Circuit similarly held in *Pomeroy* that "parties may not avoid the strictures of *Younger* simply by allowing a state judgment to become final." *Pomeroy*, 898 F.2d at 1317. The Eighth Circuit abstained in *Pomeroy* because the plaintiff in that case "failed to present its constitutional claims to the state courts." *Id.*

O'Neill, Pomeroy and the Fourth Circuit's opinion in this case stand for the proposition that *Younger* abstention is required when state proceedings are final at the time of the federal complaint, yet the plaintiff has chosen not to pursue

his state appeal remedies and instead has filed suit in federal court. These cases are in direct conflict with the decisions cited from the Fifth and Sixth Circuits and extend *Younger* beyond where it was intended to go. This Court has never held that *Younger* applies in situations where there is not a current, *ongoing* state proceeding. *Younger*, and its principles of comity and federalism simply do not apply in situations where state proceedings are final and are not ongoing. If *Younger's* underpinnings rest on a desire of the federal courts to not "unduly interfere with the legitimate activities of the States," *Younger*, 407 U.S. at 44, then once the state proceedings have become final, for whatever reason, there is no justification for a federal court to abstain because there is no interference with the legitimate activities of the states. In situations where the state proceedings have become final, the state has no activity with which the federal court should be concerned with interfering. *Younger*, and its theoretical basis simply does not apply in situations where the state proceeding is final.

Additionally, the Fourth Circuit in this case and the Third and Eighth Circuit cases impose a requirement upon a federal plaintiff to exhaust state administrative and judicial remedies before filing suit in federal court. The Fourth Circuit imposed this requirement in the face of Asheville Code §10-87 which states:

> Nothing in this article shall be construed to prevent or limit any person from seeking any remedy available in law or equity for activities that are or may be subject to regulation by this chapter, or from pursuing said remedy simultaneously with proceedings under this chapter, nor shall any of the procedures specified herein be a condition precedent to the initiation of any legal action.

Despite this clear language, the Fourth Circuit imposed a requirement that, to comply with *Younger*, a federal plaintiff must exhaust all his state administrative remedies and then must exhaust all his state judicial remedies through appeal before he can present his claim in federal court. Such a construction of *Younger* runs squarely into this Court's clear pronouncements that a federal plaintiff does not have to exhaust his state administrative and judicial remedies before filing suit in federal court. *See Patsy v. Florida Bd. of Regents*, 457 U.S. 496 (1982)(holding that a federal plaintiff does not have to exhaust state administrative remedies before bringing suit in federal court); *Monroe v. Pape*, 365 U.S. 167, 183 (1961)(holding that a remedy for violation of civil rights under 42 U.S.C. §1983 is supplementary to any state rights and, therefore, any available state judicial remedies need not be sought before first seeking a remedy in federal court).

The Third and Eighth Circuits attempt to avoid a head-on collision with *Patsy* and *Monroe* by stating that *Younger* abstention only applies when a state's proceedings are coercive rather than remedial. *See, e.g., O'Neill*, 32 F.3d at 791 n.13. To support their construction that *Younger* only applies to state coercive proceedings when the plaintiff has not pursued all available state administrative and judicial remedies, they cite to this Court's discussion in *Ohio Civil Rights Comm'n. v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986). In that case, this Court made a distinction between coercive and remedial state proceedings. The Court abstained, requiring Dayton Christian Schools to first exhaust all its available state administrative and judicial remedies before bringing suit in federal court. The Court distinguished *Patsy* by stating, "Unlike *Patsy*, the administrative proceedings here are coercive rather than remedial, began before any substantial advancement in the federal action took

place, and involve important state interests." *Dayton Christian Schools*, 477 U.S. at 627-28 n.2. As the Third Circuit described the *Dayton Christian Schools* case:

> The critical distinction between *Dayton Christian Schools* and *Patsy* is that *Patsy* involved a *remedial* action brought by the plaintiff to vindicate a wrong which had been inflicted by the State. In contrast, *Dayton Christian Schools* involved an administrative proceeding initiated by the State, before a state forum, to enforce a violation of state law. That is, in *Dayton Christian Schools*, the action taken by the Ohio Civil Rights Commission was *coercive* rather than remedial. . . .

O'Neill, 32 F.3d at 791 n.13; *see also Alleghany Corp. v. Haase*, 896 F.2d 1046, 1049-51 (7th Cir. 1990)(discussing difference between coercive and remedial state proceedings).

The major distinction between *Dayton Christian Schools* and the present case, is that *Dayton Christian Schools* involved an ongoing state proceeding that was not final whereas the present case involves a final state proceeding. This Court has never applied the coercive/remedial distinction to *final* state proceedings. Instead, the Court has only applied the coercive/remedial distinction to *ongoing* state proceedings. While both *O'Neill* and *Pomeroy* did apply the coercive/remedial distinction to final state proceedings, their application of that distinction runs counter to *Patsy* and *Monroe's* requirements that a federal plaintiff need not exhaust state administrative and judicial remedies before filing suit in federal court. Additionally, both *O'Neill* and *Pomeroy* overlook the fact that once a state proceeding has become final, it is no longer a state coercive proceeding, because the state's interests in coercing compliance with its laws has ended. Instead, when a federal plaintiff files suit

after a state coercive proceeding has become final, seeking prospective injunctive and declaratory relief against *future* enforcement of the statute he was previously prosecuted under, his federal court action is remedial in nature. Moore's case is remedial in that he seeks to remedy a *future* violation of his constitutional rights. He is not seeking to have the federal court interrupt an ongoing state coercive proceeding where the principles underlying *Younger* are implicated. Rather, there are no ongoing state proceedings in Moore's case - they are final. The City of Asheville is no longer seeking to coerce Moore into complying with its Noise Ordinance. Moore has complied with the Noise Ordinance, and now is seeking to remedy the future violation of his constitutional rights by attacking the constitutionality of the Noise Ordinance and removing the barrier that exists to his right to free speech.

Moore's challenges to the Noise Ordinance were both "as-applied" and facial. Under the Fourth Circuit's conception and application of *Younger*, Moore would be strictly limited to a prospective lawsuit against the Noise Ordinance on its face. Such a facial challenge is the most difficult to mount. As this Court stated, "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Under the Fourth Circuit's opinion, Moore would not be able to mention any of the previous actions against him in attacking the constitutionality of the Noise Ordinance and certainly would not be able to bring an "as-applied" challenge against the Noise Ordinance. *Younger* has never been applied, especially in the First Amendment context, to limit federal civil rights plaintiffs to what is the most difficult federal challenge.

Instead, when the concerns underlying *Younger* of federalism and comity are not present because the state proceedings are completely final, the federal court should be available to remedy the constitutional violations that have occurred and will occur in the future absent such federal court intervention.

The argument that *Younger* abstention should not apply in this case carries even more force given Asheville's clear acknowledgment in §10-87 of their code that any appeals or actions under the chapter containing the Noise Ordinance were not mandatory and should not be considered a precedent condition to any action, whether judicial or not. It is impossible for *Younger's* concerns about comity and federalism to be present when the state proceedings are completely final, and the state agency (in this case the City) specifically disclaims any interest in having exclusive say over the enforcement of its ordinances.

This Court should reject the Fourth, Third and Eighth Circuit's application of *Younger* to cases where the state proceedings are final and thus *Younger's* principles of federalism are not present, should grant review to reconcile the conflict in the Circuits on this issue and should follow the more well-reasoned authority laid down by this Court, and the Fifth and Sixth Circuits that hold *Younger* abstention is not appropriate when the state proceeding is final.

II.
THE FOURTH CIRCUIT'S OPINION IS IN CONFLICT WITH PRECEDENT FROM THIS COURT.

The Fourth Circuit's conclusion that *Younger* abstention applies to bar federal court intervention in state proceedings when the plaintiff to those proceedings failed to exhaust

available administrative and judicial appeals and those appeals have become final is in conflict with precedent from this Court. The panel opinion conceded that "It is true the Supreme Court has not yet held that a federal court should abstain under *Younger* from hearing a federal claim when the plaintiff has failed to exhaust state administrative remedies and defaulted on his opportunity to do so." App., 15a. The panel opinion further admitted that in applying *Younger* abstention to this case the Court was stretching *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), beyond its holding. App., 16a. In fact, The panel opinion said the *Huffman* court "suggested" the type of application employed by the Court here. *Id.* However, the *Huffman* court did not suggest such an extension of its holding, and this Court has made clear in cases decided since *Huffman* that it did not intend such an extension.

In *Huffman*, this Court applied *Younger* abstention to a case in which there was a state judicial proceeding under way at the time that the action was filed. 420 U.S. at 609. The plaintiff in *Huffman* had a sufficient judicial forum in which to have his federal constitutional rights vindicated, but had attempted to supercede the state court by filing the federal action. 420 U.S. at 609. This Court specifically stated that it was not undermining its holding in *Monroe v. Pape*, 365 U.S. 167 (1961) that a plaintiff seeking relief under 42 U.S.C. § 1983 need not first file a state court action. *Huffman*, 420 U.S. at 609 n. 21. As the *Huffman* court said, "*Monroe v. Pape* had nothing to do with the problem presently before us, that of the deference to be accorded state proceedings which have already been initiated and which afford a competent tribunal for the resolution of federal issues." *Id.*

> Our exhaustion requirement is likewise not inconsistent with such cases as *City Bank Farmers'*

> *Trust Co. v. Schnader*, 291 U.S. 24, 54 S.Ct. 259, 78 L.Ed. 628 (1934), and *Bacon v. Rutland R. Co.*, 232 U.S. 134, 34 S.Ct. 283, 58 L.Ed. 538 (1914), which expressed the doctrine that a federal equity plaintiff challenging state administrative action need not have exhausted his state judicial remedies. Those cases did not deal with situations in which the state judicial process had been initiated.

Id. Likewise, this case does not deal with the situation in which a state judicial process had been initiated. Therefore, this case is unlike *Huffman*, which involved state proceedings that had been initiated and afforded a competent tribunal for resolution of the plaintiff's claims. Consequently, *Huffman* cannot be controlling authority, and the court must look to cases such as *Monroe, City Bank,* and *Bacon* to control the determination in this case.

The conflict between the Fourth Circuit's Opinion and Supreme Court precedent is further apparent in cases decided since *Huffman*, which have consistently upheld the doctrine of *City Bank* and *Bacon* – that a federal equity plaintiff does not have to exhaust his state remedies.

This Court explicitly recognized in *Wooley v. Maynard*, 430 U.S. 705 (1977), that *Younger* abstention is not appropriate in cases where an individual may have been cited in the past for violating a code or statute, but the state proceeding is final and is not ongoing or pending at the time of the federal court action. In *Wooley*, Mr. Maynard challenged New Hampshire's statute that made it a criminal misdemeanor to obscure New Hampshire's motto on its license plate. *Id.* at 707. Because Maynard was a Jehovah's Witness who believed that the state motto of "Live Free or Die" was repugnant to his faith, he covered up the motto on his license plates. *Id.* at 707-78. Maynard was cited three

times for violating the state law. *Id.* at 708. He refused to pay the fines for the three citations and was sentenced to fifteen days in jail. *Id.* Maynard served his full sentence and, *after the sentence was served and the case was final*, he brought suit in federal court seeking an injunction against the enforcement of the statute he was convicted under *as well as a declaration that the statute was unconstitutional as applied to him. Id.* at 709.

The State argued that the federal court should have abstained under *Younger*. *See Wooley*, 430 U.S. at 709-10. The State argued that Maynard failed to seek review in the state courts of his prior convictions and therefore, the federal court should abstain from hearing Maynard's case until Maynard had exhausted his state appellate remedies. *Id.* at 710. The Supreme Court rejected this argument and held that abstention was not appropriate because there was no ongoing state proceeding and Maynard was not required to exhaust his appellate remedies before seeking injunctive and declaratory relief in federal court. *Id.* at 710-11. The Supreme Court held that even though Maynard had not sought appellate relief of his convictions, "Here, however, the suit is in no way 'designed to annul the results of a state trial' since the relief sought is wholly prospective, to preclude future prosecution under a statute alleged to violate appellees' constitutional rights." *Id.* at 711. The Court also noted that, "He does not seek to have his record expunged, or to annul any collateral effects those convictions may have, e.g., upon his driving privileges. The Maynards only seek to be free from prosecutions for future violations of the same statutes. Younger does not bar federal jurisdiction." *Id.* One of the primary reasons the Court held the way it did was because of the position Maynard found himself in. The Court stated that, "Mr. Maynard now finds himself placed 'between the Scylla

of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in (another) criminal proceeding.'" *Id.* at 710 (quoting *Steffel*, 415 U.S. at 462). As this Court said in *Wooley*:

> In *Younger* the Court recognized that principles of judicial economy, as well as proper state-federal relations, preclude federal courts from exercising equitable jurisdiction to enjoin ongoing state prosecutions. *Id.*, at 43, 91 S.Ct., at 750. However, when a genuine threat of prosecution exists, a litigant is entitled to resort to a federal forum to seek redress for an alleged deprivation of federal rights. *See Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930-931, 95 S.Ct. 2561, 2567-2568, 45 L.Ed.2d 648 (1975). *Younger* principles aside, a litigant is entitled to resort to a federal forum in seeking redress under 42 U.S.C. s 1983 for an alleged deprivation of federal rights. *Id.* at 710.

The *Wooley* court explicitly affirmed that the holding in *Huffman* was limited to the facts of that case. The plaintiff in *Huffman* had the opportunity to have his constitutional rights fully litigated in the ongoing state proceeding, but chose to circumvent those proceedings with a federal action. *Id.* at 711. *Younger* was applied in *Huffman* to require exhaustion of remedies because there was an avenue available to that plaintiff to redress his grievances. *Wooley*, 430 U.S. at 711. The Court noted that was not the case in *Wooley*, and confirmed that there is no blanket prerequisite of exhaustion

of state remedies prior to bring a federal claim. *Id.*[4]

Similarly, in *Trainor v. Hernandez*, 431 U.S. 434, 441 (1977), this Court stated that the policy of equitable restraint embodied in *Younger* was "founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights." *Younger* abstention should be applied when there is a pending state action that provides an adequate opportunity for the plaintiff to litigate his constitutional claims. *Id.* at 446. "Dismissal of the federal suit naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Id.* at 441; *See also Juidice v. Vail,* 430 U.S. 327, 337(1977) ("Here it is abundantly clear that appellees had an opportunity to present their federal claims in the state proceedings. No more is required to invoke *Younger* abstention.").

In *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 516 (1982), this Court clearly articulated that,

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[4] Defendants may not argue that Moore can just file another "wholly prospective" complaint and have his federal issues determined. First, such a complaint would be limited to a facial challenge against the Noise Ordinance which is the hardest challenge to make to an ordinance. Second, Maynard brought an "as-applied" challenge to the statute as applied to his conduct and yet his Complaint was considered "wholly prospective". Moore's Complaint in this case was not designed to annul the results of the state proceedings, but was instead designed to vindicate his constitutional rights. Such a complaint is prospective in nature and falls neatly within *Wooley's* exception to *Younger*. However, the Fourth Circuit did not view Moore's Complaint as wholly prospective, instead directing dismissal of the entire Complaint. The Fourth Circuit's opinion conflicts with *Wooley* and other like-minded precedent from this Court.

"exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to [42 U.S.C.] § 1983.We decline to overturn our prior decisions holding that such exhaustion is not required." The panel opinion attempted to distinguish *Patsy* by stating that the Supreme Court's decision in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) instituted an exhaustion of state administrative remedies for federal civil rights actions. App., 18a n4. However, in 1994, this Court affirmed that "exhaustion of state remedies is not a prerequisite to an action under §1983," *Heck v. Humphrey*, 512 U.S. 477,481 (1994).

The Fourth Circuit's decision that *Younger* abstention is appropriate when there is no opportunity for the Plaintiff to litigate his constitutional claims is not supported by the Supreme Court's holding in *Huffman*. The opinion also directly conflicts with decisions subsequent to *Huffman*. For these reasons, this Court must accept this Petition.

III.
THIS CASE PRESENTS A MATTER OF GREAT IMPORTANCE, JUSTIFYING REVIEW BY THIS COURT.

The panel opinion stated that this case addresses "an issue not directly addressed by *Younger* or its progeny." App., 3a. "The Supreme Court has not yet held that a federal court should abstain under *Younger* from hearing a federal claim when the plaintiff has failed to exhaust state administrative remedies and defaulted on his opportunity to do so."App., 15a. Until this Court makes that determination, the panel opinion will be binding precedent on this issue in the Fourth Circuit. This is true even though had Moore been located in

the Fifth, Sixth or Eleventh Circuits, the result would have been different and the courts in those circuits would not have abstained under *Younger*. There must be clear direction to individuals like Moore whose First Amendment rights are at stake. The panel's opinion creates an inter-circuit and intra-circuit conflict that leaves individuals like Moore without hope that their constitutional claims should be vindicated.

In *Wooley v. Maynard*, 430 U.S. 705 (1977), this Court recognized the position that federal plaintiffs would be put in if the Fourth Circuit's reasoning would carry the day. Accepting the argument that a federal plaintiff whose state proceedings have become final is barred from bringing federal suit under *Younger* places such individuals between the proverbial rock and a hard place. In *Wooley*, this Court recognized that, "Mr. Maynard now finds himself placed 'between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in (another) criminal proceeding.'" *Id.* at 710 (quoting *Steffel v. Thompson*, 415 U.S. 452, 462 (1974)). Moore finds himself in the same position as Maynard of either intentionally flouting the Asheville Noise Ordinance or forgoing constitutionally protected activity.

Younger was never intended to apply to situations where state court proceedings are completely final and are not pending in any way at the time of the federal action.[5] None of the comity and federalism concerns outlined in *Younger* are

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[5] Younger was also never intended to apply in situations, such as here, where §10-87 of the Asheville Code disclaims any interest in exclusive enforcement of the Noise Ordinance. Such an explicit statement makes irrelevant *Younger's* concerns about federalism and comity.

present in this case. The federal court does not have to be concerned with comity and federalism when there are no ongoing or pending state proceedings and when the state explicitly disclaims such federalism concerns in the enforcement of its ordinances. *See* Asheville Code §10-87. The Fourth Circuit's opinion in this case converted comity and federalism into a weapon to be used by a Defendant in a federal case even when there are no ongoing state proceedings and when there are no prospects for any future ongoing state proceedings. *Younger* was intended to demonstrate respect for state courts while still allowing the full and fair vindication of federal rights. The Fourth Circuit's decision in this case leaves Moore without any forum to hear his constitutional claims under the false rubrics of federalism and comity that are simply not supported by the facts of this case. This Court should grant review to protect the rights of federal plaintiffs to have their constitutional rights protected by the federal court in situations such as are present here where anindividual is faced with the unenviable task of deciding whether to flout an unconstitutional ordinance or forgo his right to free speech. The issues in this case are of great public importance and mandate review by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-1003

CARROLL MOORE,
Plaintiff-Appellant,

v.

CITY OF ASHEVILLE, NORTH CAROLINA; JAMES L. WESTBROOK, JR. in his official capacity as the City Manager of Asheville, North Carolina; ASHEVILLE POLICE DEPARTMENT,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of North Carolina, at Asheville.
Lacy H. Thornburg, District Judge.
(CA-03-218-1)

Argued: November 30, 2004
Decided: January 25, 2005

Before NIEMEYER, LUTTIG, and KING, Circuit Judges.

Affirmed and remanded by published opinion. Judge NIEMEYER wrote the opinion, in which Judge LUTTIG and Judge KING joined.

COUNSEL

ARGUED: Mathew D. Staver, LIBERTY COUNSEL, Longwood, Florida, for Appellant. Sharon Tracey Barrett, PATLA, STRAUS, ROBINSON & MOORE, P.A., Asheville, North Carolina, for Appellees. **ON BRIEF**: Michael Schmidt, PATRICK HENRY JUSTICE CENTER, Laurinburg, North Carolina; Erik W. Stanley, Rena M. Lindevaldsen, Anita L. Staver, Joel L. Oster, LIBERTY COUNSEL, Longwood, Florida, for Appellant. Curtis W. Euler, CITY ATTORNEY'S OFFICE, Asheville, North Carolina, for Appellees.

OPINION

NIEMEYER, Circuit Judge.

Carroll Moore, a carpenter from Tuckasegee, North Carolina, regularly engages in street preaching in Asheville, North Carolina, and elsewhere. In March and again in April 2003, Moore was cited for violations of Asheville's noise ordinance, Asheville, N.C.Code of Ordinances § 10-84, when his preaching allegedly interfered with permitted events taking place in Asheville's public forums. In both instances, Moore paid fines, which he did not appeal administratively or to the state courts. Rather, after the time for exhausting state remedies apparently had expired, he commenced this action against the City of Asheville and its officials under 42 U.S.C. § 1983, alleging that his conduct was protected by the First and Fourteenth Amendments to the U.S. Constitution and that Asheville's noise ordinance, as well as related ordinances, was unconstitutional both on its face and as applied to his circumstances. He seeks a declaratory judgment, injunctive relief, and damages.

The district court denied the defendants' motion to dismiss but stayed the proceedings "pending the outcome o[f] state court proceedings," based on the doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) (holding that a federal court should generally refrain from intervening in ongoing state criminal proceedings), and its progeny.

Although this case raises an issue not directly addressed by *Younger* or its progeny, or heretofore by our court, it presents the same concerns for federalism and comity that animate established *Younger* jurisprudence, and therefore we conclude, as a "necessary concomitant" of *Younger*, that abstention was appropriate. *See Huffman v. Pursue*, Ltd., 420 U.S. 592, 608, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975). In particular, we hold that a defendant to a coercive state administrative proceeding must exhaust his state administrative and judicial remedies and may not bypass them in favor of a federal court proceeding in which he seeks effectively "to annul the results" of a state administrative body. *Id.* at 608-09, 95 S.Ct. 1200; *see also Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 627, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986) (applying *Younger* to state administrative proceedings). Accordingly, we affirm the district court's application of the *Younger* doctrine to the circumstances of this case, and, because state proceedings have concluded, we remand this case to the district court with instructions to dismiss the complaint in its present form.

I

Moore has spent his weekends over the past seven years preaching the Christian Gospel on streets, sidewalks, and

other public rights-of-way in North Carolina. On two occasions, while preaching in public forums in the City of Asheville, Moore was cited by police officers for violating Asheville's noise ordinance.

Asheville's noise ordinance prohibits activity "on any premises or public area in the city, which activity produces or constitutes a noise disturbance on occupied neighboring premises or public area." Asheville, N.C., Code of Ordinances § 10-83. The ordinance defines "noise disturbance" as "any unreasonably loud and raucous sound or noise which: (1) Endangers or injures the health or safety of humans or animals; (2) Endangers or injures personal or real property; or (3) Disturbs a reasonable person of normal sensitivity." *Id.* § 10-82. In addition to the general prohibition against noise disturbances, the ordinance outlaws specific activities that tend to "produce unreasonably loud and raucous noises," including "[s]treet vending or peddling" and "[t]he use of any drum, loudspeaker or other instrument or device for the purpose of attracting attention by creation of noise to any performance, show, or sale or display of merchandise." *Id.* § 10-84.

An individual charged under and found to have violated the noise ordinance can appeal to the Noise Ordinance Appeals Board, *id.* § 10-86, and the decision of the Appeals Board can be appealed further to the City Manager, *id.* Finally, North Carolina common law allows judicial review of the City Manager's decision by a writ of certiorari issued by a state Superior Court. *See Russ v. Bd. of Educ.*, 232 N.C. 128, 59 S.E.2d 589, 591 (1950).

Moore received the first of his citations on March 29, 2003, when he began preaching near Pritchard Park while a permitted peace rally was taking place. An Asheville police officer told Moore that he would need to leave the area and

move to the other side of the street. Moore proceeded across the street, as directed, but he continued to preach to the crowd attending the peace rally. The officer then cited Moore for engaging in "street vending or peddling" so as to cause a noise disturbance, in violation of Asheville Ordinance § 10-84. The citation assessed a $50 fine, which Moore paid without challenging the citation.

Moore received his second citation on April 19, 2003, when he preached near City County Plaza, where a permitted event was taking place. This citation charged that Moore was "causing [a] disturbance by shouting a[nd] yelling at [the] crowd during [a] permitted event." He was again charged under the noise ordinance, this time for using a "drum, loudspeaker or other instrument or device for the purpose of attracting attention by creation of noise to any performance, show, or sale or display of merchandise." Because it was Moore's second violation of the noise ordinance, the citation assessed a fine of $100. Moore appealed this citation to the Noise Ordinance Appeals Board, as authorized by Asheville Ordinance § 10-86. After the Board affirmed the violation, Moore paid the $100 fine and sought no further review of the citation.

Rather than pursuing further his rights of state administrative appeal and judicial review, Moore apparently let the times for taking appeal from his citations lapse,[2] and he

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[2] The record is not completely clear as to the status of Moore's right to appeal his second citation at the time he commenced this action on August 28, 2003. The noise ordinance gave Moore 15 days from the date of the citation (April 19, 2003) to seek review from the Appeals Board. The ordinance also specifies that Appeals Board hearings shall occur within 15 days of the notice of appeal and that

commenced this action in federal court on August 28, 2003. In his complaint, which names the City of Asheville, its City Manager, and its police department as defendants, Moore facially challenges the constitutionality of Asheville's noise ordinance and related ordinances and challenges the noise ordinance as applied to him in March and April 2003. He alleges that the ordinances violated and continue to violate his freedom of speech, his right peaceably to assemble, and his right to the free exercise of religion, as secured by the First and Fourteenth Amendments.

In his complaint, Moore recites the defendants' actions on both March 29, 2003 and April 19, 2003, when he was cited for violations of the noise ordinance, and he alleges that he continues to engage in street preaching and "fears repeated civil or criminal citations." He alleges further that Asheville's "Noise Disturbance Policy, as applied, has caused and will continue to cause, [him] to suffer actual and impending irreparable injury and damage" and that he has incurred "constitutional and monetary damages as a result of Defendants' actions." The resulting damages, he alleges, were both "direct and consequential." For relief, Moore requests an injunction prohibiting the defendants "from enforcing the

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"decisions shall be issued and served within ten days of the hearing." Asheville, N.C., Code of Ordinances § 10- 86(e)(1). Under that schedule, therefore, Moore's 10-day period to appeal to the City Manager would have expired sometime in late June 2003. We cannot presume with certainty, however, that the schedule established by the ordinance was in fact followed because the ordinance gives the Appeals Board the power to extend, by order, "[t]he times for conducting hearings and issuing decisions." *Id.*

policies against Plaintiff"; a declaratory judgment declaring that the noise ordinance is invalid on its face and "as applied by Defendants insofar as it prohibits Plaintiff from street preaching"; and an award of "such damages as are reasonable and just under the circumstances as a direct and proximate result of the Defendants' violations of Plaintiff's constitutional rights." In addition to challenging the noise ordinance, Moore also facially challenges related statutes that were not enforced against him, including Asheville's public speaking and picketing ordinances.

On the City of Asheville's motion to dismiss, the district court dismissed the claims against the City Manager because they were redundant with claims against the City itself and the claims against the Asheville Police Department because, under North Carolina law, the department is not a person capable of being sued. It also dismissed the claims challenging the public speaking and picketing ordinances because Moore failed to demonstrate a "credible threat of prosecution" under them. The court, however, denied the motion to dismiss the remainder of the complaint against the City, concluding rather that, under the holding of *Younger v. Harris*, it should abstain from determining Moore's remaining claims against the City. Accordingly, the court stayed the case "pending the outcome of the state proceedings." By this time, it was certain that no state proceedings were pending and that the times for appealing the citations had elapsed.

From the district court's November 13, 2003 order, Moore filed this appeal, challenging only the district court's order staying his claims against the City under the *Younger* doctrine.

II

Because the district court stayed Moore's claims, rather

than dismissing his complaint, we initially must consider whether the district court's November 13, 2003 order is a final judgment so as to give us jurisdiction over Moore's appeal. Section 1291 of Title 28 grants courts of appeals appellate jurisdiction over "final decisions of the district courts," and a "final decision" is one that "ends the litigation on the merits and leaves nothing for the [district] court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945). In *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 713, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996), however, the Supreme Court held that a district court order that stayed federal court proceedings pending the outcome of state court proceedings was immediately appealable even though it did not fit comfortably within the definition of a final judgment. The finality of the order entered in this case is yet more certain because the effect of the district court's order to stay, pending the outcome of a state proceeding, effectively ended the litigation in view of the facts that no state court proceedings were pending at the time of the district court's order and the administrative "judgments" were no longer appealable.

Accordingly, we conclude that we have jurisdiction to review the district court's order.

III

> Stated simply, the *Younger v. Harris* doctrine holds that a federal court should abstain from interfering in a state proceeding, even though it has jurisdiction to reach the merits, if there is (1) an ongoing state judicial proceeding, instituted prior to any substantial progress in the federal proceeding; that (2) implicates important, substantial, or vital state interests; and (3) provides an adequate opportunity for the plaintiff to

> raise the federal constitutional claim advanced in the federal lawsuit.

Nivens v. Gilchrist, 319 F.3d 151, 153 (4th Cir.2003) (citing *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982)). In *Younger* itself, after the plaintiff had been indicted under the California State Syndicalism Act but before he was tried, the plaintiff filed a federal action seeking to enjoin the state proceedings on the ground that the Syndicalism Act violated the U.S. Constitution. After the lower federal courts enjoined the state court proceedings, the Supreme Court reversed and instructed that "the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions" unless the federal plaintiff demonstrates either that he will suffer irreparable injury that is "both great and immediate" or that the state statute is "flagrantly and patently" unconstitutional. *Younger*, 401 U.S. at 45, 53, 91 S.Ct. 746. Relying on equitable principles, the Supreme Court concluded that the federal plaintiff seeking the equitable remedy of an injunction failed to demonstrate that the state proceedings threatened him with injury that would remain unremedied if the state proceedings terminated in his favor. *Id.* at 54, 91 S.Ct. 746. The Court, however, did not rely only on equitable principles. It was also concerned about the "more vital" notion of federalism and comity implicated by interfering with ongoing state proceedings:

> This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the

> National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Id. at 44, 91 S.Ct. 746 (emphasis added). This underlying policy heightened the degree of irreparable injury a plaintiff had to show to obtain such an injunction--namely, that the state statute was "flagrantly and patently" unconstitutional or that it was being enforced in "bad faith," in a harassing manner, or in "any other unusual circumstance that would call for equitable relief." *Id.* at 54, 91 S.Ct. 746.

Moore contends first that the district court erroneously applied the doctrine of *Younger v. Harris* because that doctrine applies only to protect ongoing state proceedings from federal interference. He points out that there were no pending state proceedings at the time because he had forgone the opportunity to appeal both the first citation by paying the $50 fine and the second citation by not appealing to the City Manager within the time allowed by the ordinance. Similarly, he argues, at the time of the district court's decision to abstain, the City administrative bodies and the state courts were "doing nothing related to [his] Noise Ordinance citations[;] they plan[ned] on doing nothing related to the citations, nor could they [have done] anything in the future related to the citations."

Before addressing Moore's argument that the lack of any pending state proceedings renders *Younger* inapplicable, we are prompted by Moore's emphasis on the finality of the administrative decisions in this case to consider first two separate, but closely related doctrines: *res judicata*, *see Huffman*, 420 U.S. at 607-08 n. 19, 95 S.Ct. 1200, and the *Rooker-Feldman* doctrine, as Moore himself has suggested.

It is now established by federal common law that federal courts will apply *res judicata* to unreviewed determinations

of state administrative agencies if the State itself would do so. *See Univ. of Tenn. v. Elliott*, 478 U.S. 788, 799, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986) (holding that "when a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts" (internal quotation marks and citation omitted)). The Court drew on the rationale of the full-faith-and-credit provisions of 28 U.S.C. § 1738 and the Full Faith and Credit Clause of the U.S. Constitution, U.S. Const. art. IV, § 1, to adopt a federal common law principle that serves the values of both repose and federalism. *Id.* at 798-99, 106 S.Ct. 3220. Thus, if North Carolina were to give its own unreviewed determinations of administrative agencies preclusive effect, so too would a district court in a federal action. But *res judicata* was not raised as a defense before the district court, and that court accordingly did not address the question of its applicability. *See Huffman*, 420 U.S. at 607-08 n. 19, 95 S.Ct. 1200.

The *Rooker-Feldman* doctrine might likewise be considered to bar a federal action from in effect reviewing state administrative agency "judgments."[3] Because the

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[3] As we summarized the *Rooker-Feldman* doctrine in *American Reliable Insurance Co. v. Stillwell*, 336 F.3d 311 (4th Cir.2003), "a 'party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court.'" *Id.* at 316 (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1005-06, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994)). Although federalism and comity surely attend application of the *Rooker-Feldman* doctrine, the doctrine operates principally to preserve the

decision of an administrative agency can be appealed vertically by petitioning the state courts and the U.S. Supreme Court for review, it might be argued that the *Rooker-Feldman* doctrine should apply to administrative "judgments" as it does to court judgments--i.e., to bar what in effect would become a lateral review of a state agency "judgment" in a U.S. district court. Again, however, this issue was neither presented to the district court nor decided by it. Moreover, while we have never considered the question, other courts of appeals have concluded that the *Rooker-Feldman* doctrine does not apply to administrative "judgments," limiting its application only to state court judgments. *See, e.g., Van Harken v. City of Chicago*, 103 F.3d 1346, 1348-49 (7th Cir.1997); *Narey v. Dean*, 32 F.3d 1521, 1525- 26 (11th Cir.1994); *Ivy Club v. Edwards*, 943 F.2d 270, 284 (3d Cir.1991); *Scott v. Flowers*, 910 F.2d 201, 208 (5th Cir.1990).

More important to the issue before us are the subtle distinctions to be made between the policies underlying *res judicata* and the *Rooker-Feldman* doctrine, on the one hand, and those underlying the *Younger* doctrine, on the other. Although *res judicata* and *Rooker-Feldman* bar federal courts from reconsidering state court judgments, those doctrines are not designed specifically to promote respect for state

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structure of appeals from state courts to the United States Supreme Court under 28 U.S.C. § 1257(a) and to bar any proceeding that would functionally amount to a lateral appeal to a United States district court. *See Stillwell*, 336 F.3d at 316-17. For this reason, the *Rooker-Feldman* doctrine prohibits a district court even from "consideration of 'issues actually presented to and decided by a state court.'" *Id.* at 317 (quoting *Plyler v. Moore*, 129 F.3d 728, 731 (4th Cir.1997)).

substantive policies, and they thus apply regardless of whether the state judgment implicates a substantive state interest. The *Younger* doctrine, on the other hand, addresses both concerns as demonstrated by the Supreme Court's extension of *Younger* beyond the context of state criminal proceedings to only those state proceedings that implicate equally weighty state interests.

In extending *Younger* to prescribe abstention in favor of state civil actions, the Supreme Court in *Huffman*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482, was mindful that the doctrine was originally applied to protect the state interests represented in criminal prosecutions. Consequently, it extended the *Younger* doctrine only to civil cases in which important state interests were at stake, such as a nuisance action:

> Strictly speaking, this element of *Younger* [the reluctance of federal courts to interfere with a criminal prosecution] is not available to mandate federal restraint in civil cases. But whatever may be the weight attached to this factor in civil litigation involving private parties, we deal here with a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases. The State is a party to the Court of Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials. Thus, an offense to the State's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding.

Id. at 604, 95 S.Ct. 1200. Thus, recognizing that the State's nuisance action was a coercive civil proceeding to which the State was a party, the Supreme Court concluded that federal

court interference would disrupt the State's efforts "to protect the very interests which underlie its criminal laws." *Id.* at 605, 95 S.Ct. 1200; *see also Ohio Civil Rights Com'n*, 477 U.S. at 628, 106 S.Ct. 2718 (holding that the "elimination of prohibited sex discrimination is a sufficiently important state interest" to bring state administrative proceedings by a civil rights commission within the ambit of *Younger*); *Middlesex County Ethics Comm.*, 457 U.S. at 434, 102 S.Ct. 2515 (holding that *Younger* protects ongoing state disciplinary proceedings because the State "has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses").[4]

The case before us implicates not only concerns about avoiding duplicative litigation and respecting the appellate processes designed by Congress and the Asheville City Council, but also concerns about respecting Asheville's efforts to enforce its substantive policies against noise disturbances. Because *Younger* is the only doctrine that addresses all of these concerns, and because neither *res judicata* nor the *Rooker-Feldman* doctrine was raised in the district court, we conclude that *Younger* is the doctrine most completely applicable to the circumstances of this case.

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[4] Although the Supreme Court has since extended *Younger* beyond proceedings to which the State is a party, *see, e.g., Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987), it has done so only when the civil proceedings "involv[e] certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 368, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989).

According to Moore, the fact that the state proceedings concluded prior to his federal complaint undermines the rationale behind *Younger* abstention. He states, "If *Younger's* underpinnings rest on a desire of the federal courts to not 'unduly interfere with the legitimate activities of the States,' then once the state proceedings have become final, for whatever reason, there is no justification for a federal court to abstain because there is no interference with the legitimate activities of the states" (quoting *Younger*, 401 U.S. at 44, 91 S.Ct. 746). He adds, "*Younger* does not require abstention merely because [he] at one point had a state remedy available to him which he chose not to pursue because those state proceedings are now completely final.... Younger never intended such an absurd result."

Although Moore's argument makes sense under *Younger's* original articulation, it overlooks the Supreme Court's extension of the doctrine in subsequent cases to give full effect to the policies underlying *Younger* in the context of completed state proceedings. In *Huffman*, the Supreme Court applied *Younger* to bar a federal action, even when the state court proceedings had ended by the time the federal complaint was filed, so long as the federal complaint was designed "to annul the results of a state trial." *Huffman*, 420 U.S. at 609, 95 S.Ct. 1200. It is true that the Supreme Court has not yet held that a federal court should abstain under *Younger* from hearing a federal claim when the plaintiff has failed to exhaust state administrative remedies and defaulted on his opportunity to do so. The Court did, however, suggest such an application in *Huffman* and applied the *Younger* doctrine in the face of pending administrative proceedings in *Ohio Civil Rights Commission*, 477 U.S. at 628-29, 106 S.Ct. 2718.

In *Huffman*, the plaintiff filed a federal § 1983 action to enjoin, on U.S. constitutional grounds, enforcement of a state

court civil judgment entered against him, declaring that his theater was a nuisance because it showed pornographic films. Noting that the plaintiff had failed to appeal the judgment to the state appellate court, the Supreme Court held that the lower federal court should have abstained from enjoining the enforcement of the judgment under the *Younger* doctrine.

The strict holding of *Huffman* applied *Younger* to bar federal intervention into a state coercive civil proceeding when the plaintiff filed his federal complaint after the state judgment had been rendered but before the time for appealing had run its course. Although it was unclear whether the state court judgment had become nonappealable before the federal court entered its injunction judgment, the Supreme Court suggested that that fact was not critical to the application of the Younger doctrine:

> We need not, however, engage in such inquiry. For regardless of when the Court of Common Pleas' judgment became final, we believe that a necessary concomitant of *Younger* is that a party in appellee's posture must exhaust his state appellate remedies before seeking relief in the District Court, unless he can bring himself within one of the exceptions as specified in *Younger*.

420 U.S. at 608, 95 S.Ct. 1200. The Court's lack of concern about the relative timing of the federal and state court proceedings was deliberate to allow the Court to maintain its focus on the core *Younger* concerns of (1) whether the federal action was "duplicative," (2) whether it cast a "direct aspersion on the capabilities and good faith of state appellate courts," (3) whether it was "disruptive" of the State's important interests, and (4) whether the federal action was "designed to annul the results of [the] state trial." *Id.* at 608-09, 95 S.Ct. 1200.

In the case before us, Moore sought federal court intervention apparently after the state administrative "judgment" had become non-appealable by reason of his failure timely to take available state avenues of review. To apply *Younger* to this circumstance might stretch *Huffman* slightly beyond its strict holding. But we conclude that any differences between the timing in this case and in *Huffman* do not alter the proper legal analysis. We continue to focus on *Younger's* policy of commanding federal restraint when the federal action is duplicative, casts aspersion on state proceedings, disrupts important state enforcement efforts, and is designed to annul a state proceeding.

By initiating this suit in federal court after the state administrative agency determined that he had violated the noise disturbance ordinance, Moore seeks to relitigate a dispute that has already been resolved and to receive as damages the amounts that he paid as fines. Moreover, to the extent that Moore in this case seeks to annul or trample on the results of state administrative proceedings, he interferes with the State's interest in enforcing its substantive laws as well as its interest in enforcing those laws through available administrative procedures and in its own courts. That Moore did not avail himself of state-provided avenues for review can only cast aspersion on the State's "capabilities and good faith," *Huffman*, 420 U.S. at 608, 95 S.Ct. 1200, and deprive the State of "a function which quite legitimately is left [to the state appellate bodies], that of overseeing [agency] dispositions of constitutional issues which arise in civil litigation over which they have jurisdiction," *id.* at 609, 95 S.Ct. 1200. Federal court intervention would also disrupt the City's efforts to enforce its substantive policy against noise disturbances.

Thus, regardless of whether state appellate remedies were

still available at the time Moore filed suit in federal court or whether he had already defaulted on such remedies, the federal court intervention that he sought would be duplicative, would disrupt the State's substantive policies, would offend the State's appellate processes, and would undo what the State has done by a now-nonappealable order. Accordingly, we conclude that under *Huffman*, the *Younger* doctrine applies to bar federal court reconsideration of state coercive proceedings even when the state proceedings have ended, as long as the federal proceeding casts aspersion on the state proceedings or annuls their results.

The final step to application of the *Younger-Huffman* doctrine to this case, however, requires consideration of whether the exhaustion principles imposed by the *Huffman* Court to protect state appellate court proceedings apply as well to protect state appellate administrative proceedings. To conclude that they do, we rely on the Court's decision in *Ohio Civil Rights Commission*, 477 U.S. 619, 106 S.Ct. 2718, 91 L.Ed.2d 512. There, the Supreme Court held that *Younger* required federal courts to abstain in favor of pending state administrative proceedings.[5] Rejecting the plaintiff's

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[5] Generally, claimants bringing suit in federal court under 42 U.S.C. § 1983 need not exhaust their administrative remedies. *See Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). In *Ohio Civil Rights Commission*, however, the Court distinguished remedial state administrative proceedings, which it had addressed in *Patsy*, from those that are coercive, concluding that *Younger* requires federal courts to abstain in favor of pending state administrative proceedings that are coercive in nature. 477 U.S. at 627 n. 2, 106 S.Ct. 2718. The administrative proceedings against Moore were unquestionably coercive, as

argument that abstention in favor of such proceedings was inappropriate because state law did not authorize the agency to address constitutional challenges, the Court explained that abstention was nonetheless appropriate because the agency could "construe its own statutory mandate in the light of federal constitutional principles" or the plaintiff could raise its constitutional claims in "state-court judicial review of the administrative proceeding." *Id.* at 629.

We find the rationale behind the Court's holding in *Ohio Civil Rights Commission* equally applicable where the administrative proceedings are no longer pending because of the plaintiff's failure to exhaust his administrative appellate remedies. In particular, by failing to pursue administrative appellate remedies, the plaintiff short-circuits both the agency's ability to interpret its statutes in conformity with the Constitution and the state courts' ability to correct constitutionally infirm agency decisions.

At bottom, we conclude that the *Younger* principles were properly applied in this case to bar federal court intervention in state administrative proceedings even when the defendant to those proceedings had failed to exhaust available administrative appeals, thereby defaulting on his appellate rights. Such a holding rests, we conclude, on the rationales of *Huffman* and *Ohio Civil Rights Commission*, which extended *Younger* to circumstances like those before us.

IV

At oral argument, Moore seemed to concede the application of the *Younger* principles to unexhausted but completed administrative proceedings, and he redirected his

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were those in *Ohio Civil Rights Commission*, and the *Patsy* principle is therefore inapplicable.

argument more forcefully to his second contention that his complaint does not look retrospectively on the state enforcement proceedings against him and therefore does not seek to challenge or annul them. Indeed, as he argues, his complaint is forward-looking, filed in an effort to declare Asheville's ordinances unconstitutional for future application. In his brief, he maintains that if he is not able to prosecute this action for such prospective relief, he would "be left to either flout the Asheville noise ordinance or forgo his constitutional right to free speech." "Abstaining in this case," he states, "would have the absurd and unintended result of leaving Moore with no remedy for the violation of his constitutional rights."

Of course, if Moore is correct about his characterization of his complaint, he is correct in arguing that the *Younger* doctrine should not be applied to stay this action. *See Wooley v. Maynard*, 430 U.S. 705, 711, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (noting that *Younger* does not bar a wholly prospective federal action even if the plaintiff failed to exhaust his state appellate remedies on a prior conviction). In *Wooley*, the federal plaintiff had been convicted of violating a state statute and had already served his sentence when he brought suit in federal court, seeking a declaratory judgment that the statute under which he had been convicted was unconstitutional and an injunction enjoining the State from prosecuting him in the future under the statute. *Id.* at 708-09, 97 S.Ct. 1428. Because the federal plaintiff sought prospective relief against the threat of future prosecution and did not seek to "have his record expunged, or to annul any collateral effects" of his conviction, the Supreme Court held that *Younger* did not require the federal court to abstain even though the plaintiff had failed to seek review of his conviction in the state appellate court. *Id.* at 710-11, 97 S.Ct. 1428.

While Moore's argument rests on sound legal principles, we disagree with his characterization of his complaint as wholly prospective. To be sure, his complaint does request a declaratory judgment and an injunction from future prosecution, and such relief may be based on allegations in the complaint that Moore's street preaching is ongoing. But the complaint also seeks to annul the effects of the prior state administrative proceedings to the extent that Moore seeks a declaratory judgment that the City of Asheville unconstitutionally applied its ordinances to cite him in the past and demands direct and consequential monetary damages from the City for its actions.

Moore's complaint lays out in some detail the City's actions in citing him for violation of the noise ordinance, once in March and again in April 2003. He alleges that both of the City's enforcement actions were illegal inasmuch as they relied on an ordinance that was unconstitutional under the First Amendment, and he asserts that these enforcements caused him monetary damages, both direct and consequential. For example, he repeatedly alleges in his complaint that Asheville's noise ordinance "as applied, has caused ... Plaintiff to suffer actual ... injury and damage"; that "Plaintiff has and will continue to suffer ... monetary damages as a result of [the City's] actions"; that he has "in the past and will continue to suffer in the future, direct and consequential damages." And in his prayer for relief, he demands "such damages as are reasonable and just under [the] circumstances as a direct and proximate result of [the City's] violations of Plaintiff's constitutional rights."

These demands for monetary damages in respect to the City's actions are retrospective in that they seek to compensate Moore for injury that has already occurred; they look backward toward a wrong committed in the past. *Cf.*

Edelman v. Jordan, 415 U.S. 651, 668, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (explaining that a remedy that is "measured in terms of a monetary loss resulting from a past breach of a legal duty" is retrospective for purposes of Eleventh Amendment immunity). Obviously such an award would annul the effects of the State's proceedings by essentially refunding to Moore part or all of the fines he paid in connection with his citations. Because Moore's complaint in its present form is not limited to seeking prospective relief, it does not fit within the *Wooley v. Maynard* exception to *Younger's* exhaustion requirement. Thus, the district court correctly applied *Younger* in abstaining from proceeding further under Moore's complaint as it is drafted.

V

In sum, Moore's complaint challenging Asheville's noise ordinance is broad, alleging both past conduct by the City, which he contends was illegal and damaging, and ongoing unlawful conduct. For relief, he seeks a declaration that the City's enforcement in the past was illegal and continues to be illegal; that the City be enjoined; and that the City pay him direct and consequential money damages for its past conduct. To the extent that Moore's complaint looks back on the City's past actions and demands compensation for them, it seeks to annul what has already been determined by two police officers and the Asheville Noise Ordinance Appeals Board. Even though no state proceedings were pending when Moore filed his federal complaint--because he had let the times for appeal lapse--we conclude that his efforts in this case to cast aspersion on state processes and to annul the results of administrative proceedings were properly barred by the district court under *Younger-Huffman*. Accordingly, we affirm.

Because no avenues are now open for Moore to exhaust

state administrative and judicial appeals with respect to his two citations, his federal complaint must be dismissed in its present form. Accordingly, we remand to permit the district court to modify its order in this regard. Of course, Moore is not barred from attempting to pursue wholly prospective relief in federal court as authorized by *Wooley v. Maynard*.
AFFIRMED AND REMANDED.

United States District Court,
W.D. North Carolina,
Asheville Division

Carroll MOORE, Plaintiff,
v.
CITY OF ASHEVILLE, NORTH CAROLINA;
James L. Westbrook, Jr., in his official capacity as the
City Manager of Asheville, North Carolina;
and Asheville Police Department, Defendants.

No. CIV. 1:03CV218.

Nov. 13, 2003.

MEMORANDUM OF OPINION

THORNBURG, District Judge.

THIS MATTER is before the Court on the Plaintiff's motions for declaratory judgment, preliminary injunctive relief, and waiver of posting security to obtain a preliminary injunction, filed on August 28, 2003, and the Defendants' Motion to dismiss, filed October 6, 2003. Responses have been filed, and the matters are ready for resolution.

I. STATEMENT OF FACTS

Plaintiff Carroll Moore, a carpenter who resides in Tuckasegee, North Carolina, has regularly engaged in street preaching for the past seven years. Verified Complaint for Declaratory Judgment, Preliminary and Permanent Injunctive Relief and Damages ("Complaint"), ¶¶ 9, 14, 17. Plaintiff describes his "street preaching" as "[sharing] his faith by verbal means with those he meets on the street, sidewalks and

other public right-of-ways." *Id.*, ¶ 16.

On the afternoon of March 29, 2003, Plaintiff began preaching near Pritchard Park, in downtown Asheville, North Carolina, on a public right-of-way. *Id.*, ¶ 28. At that time, a permitted event was taking place in Pritchard Park. *Id.*, ¶ 30. A police officer told Plaintiff that he would have to move to the other side of the street to continue his preaching. *Id.*, ¶ 31. Plaintiff did so, and although he claims he was not selling any type of merchandise and was not soliciting donations, he was later cited for "street vending or peddling" in violation of § 10-84 of the Asheville City Code of Ordinances ("Code"). *Id.*, ¶¶ 32, 33, 35; Exhibit I, attached to Complaint. Plaintiff was fined $50, which he paid. *Id.*, ¶ 36.

On the afternoon of April 19, 2003, Plaintiff again began preaching at the City County Plaza in downtown Asheville. *Id.*, ¶ 37. A permitted event was taking place in front of City Hall. *Id.*, ¶ 39. An Asheville police officer cited Plaintiff for using a "drum, loudspeaker or other instrument or device for the purpose of attracting attention by creation of noise to any performance, show, or sale or display of merchandise" in violation of Code § 10-84. Id., ¶ 40; Exhibit J, attached to Complaint. Plaintiff contends that he was not using a drum, loudspeaker, or any other instrument or device. *Id.*, ¶ 42. The fine assessed was $100. *Id.*, ¶ 41. Before paying the fine, Plaintiff appealed the citation to the Noise Ordinance Appeals Board, which upheld the citation. *Id.*, ¶¶ 44-45. Thereafter, Plaintiff paid the $100 fine. *Id.*, ¶ 46.

Plaintiff contends several Code provisions are unconstitutional on their face and/or as applied. The first is § 16-4 ("Public Speaking Ordinance"), which provided that

> No person shall deliver a sermon, lecture, address, or discourse or give any public demonstration, exhibition or entertainment nor shall any person ... advertise any

> entertainment, show, or public sale ... on the streets, alleys, sidewalks, public squares or any public grounds of the city, without having first obtained the written permission of the city manager. Such permission may at any time be revoked by the city manager if in his opinion the good morals and order of the city so demand.

Exhibit A, attached to Complaint. Plaintiff was not charged under this ordinance, and the City of Asheville repealed the Public Speaking Ordinance on October 14, 2003. Defendants' Supplemental Memo In Support of Motion to Dismiss, filed October 17, 2003.

Plaintiff further contends that §§ 16-113 and 16-116 ("Picketing Ordinances") are unconstitutional, although he was not cited under these ordinances. Section 16-113 defines "picketing" as "the stationing of any person by standing, lying, walking, sitting, kneeling, bending or in any other similar manner at a particular place so as to persuade, or otherwise influence another person's actions or conduct, or to apprise the public of an opinion or message." Exhibit B, attached to Complaint. Section 16-116 provides that picketing is allowed provided that it is "conducted only on sidewalks or other city-owned areas normally used or reserved for pedestrian movement," that "[p]icketers ... observe the right of non-picketers to utilize the public rights-of-way," and that "[p]icketers shall walk in single file and not abreast." Exhibit C, attached to Complaint. It also states that "[p]icketers are encouraged to provide notice to the chief of police of intent to picket." *Id.* Finally, it provides that when "the free passage of any street or other public area in the city shall be obstructed by picketers" or "by a crowd," the "persons picketing" or the "persons composing such crowd" "shall disperse or move along when directed to do so by a police officer." *Id.*

However, "[n]othing in this section shall prohibit any person from reconvening after dispersing so long as free passage of any street or other public area is not obstructed." *Id.*

Finally, Plaintiff claims that §§ 10-83-10-85 ("Noise Ordinances") are unconstitutional as applied to him. Section 10-83 provides that "[e]xcept as allowed in this article, no person shall willfully engage in any activity on any premises or public area in the city, which activity produces or constitutes a noise disturbance on occupied neighboring premises or public area." Exhibit D, attached to Complaint. More specifically, § 10-84 bans, among other things, "[s]treet vending or peddling" and "[t]he use of any drum, loudspeaker or other instrument or device for the purpose of attracting attention by creation of noise to any performance, show, or sale or display of merchandise." Exhibit F, attached to Complaint. However, § 10-85 specifies that "[u]namplified noncommercial speeches made from a fixed location in non-residentially zoned areas" do not violate § 10-83. Exhibit G, attached to Complaint.

Section 10-86 provides for a Noise Ordinance Appeals Board ("Appeals Board") to which a person charged under the Noise Ordinances may appeal. Section 10-86 also provides that a decision of the Appeals Board may be appealed to the City Manager. Under North Carolina General Statutes § 1-269, an individual is entitled to request the superior court to grant certiorari and review a decision of the city manager pertaining to violations of the Noise Ordinances. *See Russ v. Bd. of Educ. of Brunswick County,* 232 N.C. 128, 130, 59 S.E.2d 589, 591 (1950).

II. PROCEDURAL HISTORY

As stated above, Plaintiff filed his complaint, along with motions for declaratory judgment, preliminary injunctive

relief, and waiver of posting security to obtain preliminary injunctive relief on August 28, 2003. The Defendants moved to dismiss under the *Younger* abstention doctrine and Federal Rule of Civil Procedure 12(b) on October 6, 2003.

III. DISCUSSION

A. Motion to dismiss

1. The Noise Ordinances.

Defendants claim that the doctrine adopted in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), mandates that this Court abstain from hearing Plaintiff's claims regarding the Noise Ordinances. Under *Younger*, a federal court must not interfere with a state proceeding by awarding injunctive or declaratory relief where the proceeding is ongoing, implicates important state interests, and provides an adequate opportunity for the plaintiff to litigate his federal claims. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982); *Martin Marietta Corp. v. Maryland Comm. on Human Relations*, 38 F.3d 1392, 1396 (4th Cir.1994).

Plaintiff argues there is no ongoing state proceeding because he did not appeal his initial citation and has ceased pursuing the appeal of his second citation. Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint, filed October 23, 2003, at 3. Plaintiff's argument raises the issue of whether the mere availability of a remedy at the state level, even if a plaintiff is not pursuing it, constitutes an ongoing state proceeding for the purpose of *Younger*. Although other circuits may hold otherwise, *see Thomas v. Texas State Bd. of Medical Examiners*, 807 F.2d 453 (5th Cir.1987); *cf. also Peachlum v. City of York, Pennsylvania*, 333 F.3d 429 (3rd Cir.2003), a district court in the Fourth Circuit has clearly held that the

availability of a remedy at the state level does constitute an ongoing state proceeding. *Phillips v. Virginia Bd. of Medicine*, 749 F.Supp. 715, 724-30 (E.D.Va.1990). This is the position most consistent with the Supreme Court's interpretation of *Younger*. The Supreme Court has acknowledged that its precedent "suggests, perhaps, that an administrative proceeding to which Younger applies cannot be challenged in federal court even after the administrative action has become final" if the federal plaintiff still has remedies in the state courts. *New Orleans Public Serv., Inc., v. Council of the City of New Orleans*, 491 U.S. 350, 370 n. 4, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989). Although the Court in *New Orleans Public Service* stated that such a suggestion came in dicta and did not constitute binding precedent, two justices believed that the previous "suggestion" was, in fact, binding precedent. *Id.*, at 374, 109 S.Ct. 2506 (Rehnquist, C.J., concurring); *Id.*, at 374-75, 109 S.Ct. 2506 (Blackmun, J., concurring). Since Supreme Court precedent so "suggests" and since a court in this Circuit has so held, this Court holds that an available state remedy, even if the federal plaintiff does not pursue it, is an ongoing state proceeding for *Younger* purposes.

Furthermore the present case is a more obvious one for abstention than *Phillips* and *New Orleans Public Service*. In those cases, the federal plaintiffs had actually exhausted their administrative remedies, and their cases were between the administrative and state levels. In the present case, Plaintiff has failed to exhaust his administrative remedies; he failed to appeal the first citation to the Appeals Board and failed to appeal the second one to the City Manager. Therefore, the present proceedings have even more the feel of "pending" proceedings than did the proceedings in *Phillips* and *New Orleans Public Service*.

Since there are pending state proceedings, the Court must abstain under *Younger* if the state proceedings implicate important state interests and give Plaintiff an opportunity to litigate his federal claims. *Middlesex, supra.* Plaintiff, quite correctly, does not argue that either of these factors is absent. For the purposes of *Younger* analysis, "important state interest" is defined broadly, and courts look to "the importance of the generic proceedings to the State." *New Orleans Public Serv., supra,* at 365, 109 S.Ct. 2506. For example, in *Younger*, the Supreme Court did not look to the importance of California's interest in preventing a person from distributing handbills; it looked to California's interest in " 'carrying out the important and necessary task' of enforcing its criminal laws." *Id.* (quoting *Younger*, 401 U.S. at 51-52, 91 S.Ct. 746). North Carolina has an important interest in reviewing and enforcing the decisions of the state and municipal agencies. Therefore, the state proceeding implicates an interest that is important to the State of North Carolina. Furthermore, since "state courts have the solemn responsibility, equally with the federal courts to guard, enforce, and protect every right granted or secured by the constitution of the United States," *Steffel v. Thompson*, 415 U.S. 452, 460-61, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) (internal citations and quotations omitted), the proceeding in state court would provide Plaintiff with adequate opportunities to raise his federal claims for injunctive and declaratory relief. Therefore, this Court must abstain from hearing those claims.

The Court further notes that abstaining in this cases advances *Younger's* policy of preventing federal courts from deciding constitutional questions where state courts may interpret the law in a way that makes a constitutional determination unnecessary. *O'Neill v. City of Philadelphia,*

32 F.3d 785, 791 (3rd Cir.1994). If it is true that Plaintiff's speeches were unamplified non-commercial speeches from fixed locations in non-residential areas (Code § 10-83), and that he was not selling merchandise, soliciting donations, or using a drum or loudspeaker (Code § 10-84), this Court is confident that the state courts will properly apply the law. Not only does Plaintiff seem to have a greater chance of success arguing that the Code was misapplied than he does making constitutional claims, success on those grounds would prevent this Court from having to make a constitutional determination. Furthermore, if Plaintiff's allegations as to his conduct prove true and a state court were still to deny Plaintiff's appeal, he would then have a stronger constitutional case to bring in federal court.

Plaintiff points to Code § 10-87 for the proposition that he may pursue remedies in federal court before exhausting all administrative and state remedies. That section states:

> Nothing in this article shall be construed to prevent or limit any person from seeking any remedy available in law or equity for activities that are or may be subject to regulation by this chapter, or from pursuing said remedy simultaneously with proceedings under this chapter, nor shall any of the procedures specified herein be a condition precedent to the initiation of any legal action.

Exhibit 5, attached to Affidavit of James L. Westbrook, Jr., filed October 6, 2003. Assuming, *arguendo*, that this provision does represent the desire of the City of Asheville to circumvent *Younger*, the City would not have the power to do so. As stated above, the State has an important interest in reviewing the determinations made by state and municipal agencies. The City of Asheville may not take away North Carolina's power to review those determinations. Therefore,

despite the Code section recited above, the Court maintains that it must respect North Carolina's interest in enforcing and reviewing agency decisions and that it must, therefore, abstain from interfering with this ongoing state proceeding.

Plaintiff may argue that *Younger* should not apply because of the Supreme Court's holding in *Patsy v. Bd. of Regents of the State of Florida*, 457 U.S. 496, 507, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982), that a plaintiff is not "compelled in every case to exhaust state administrative remedies before filing an action under [§ 1983]." *Id.* In *Patsy*, however, the state proceeding was a remedial one, rather than the coercive proceeding present in this case, and the rule that the Court announced in *Patsy* allowing § 1983 plaintiffs to file actions in federal court before exhausting state remedies applies only when the state proceeding is remedial. *Ohio Civil Rights Comm. v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 627 n. 2, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986) (abstaining under the *Younger* doctrine because "[u]nlike *Patsy*, the administrative proceedings here are coercive rather than remedial"); *see also Cooper v. Bombela*, 34 F.Supp.2d 693, 697 (N.D.Ill.1999) (explaining that the *Younger* doctrine exists to prevent federal courts from thwarting state efforts to hold individuals accountable for violating their laws and that *Younger* abstention, therefore, is only appropriate when the federal plaintiff is the defendant in a state court action). Because the underlying proceedings in this case are coercive proceedings against the Plaintiff for violating the Noise Ordinances, *Patsy* is inapplicable.

For the reasons outlined above, the *Younger* abstention doctrine applies to Plaintiff's claims regarding the Noise Ordinances. Therefore, this Court must refrain from granting injunctive or declaratory relief that would interfere with the state court proceedings. However, under *Younger*, it is not

appropriate to dismiss actions containing claims for monetary damages; district courts should stay such actions pending the resolution of the state proceedings. *Suggs v. Brannon,* 804 F.2d 274, 279-80 (4th Cir.1986) ("[I]n order to afford plaintiffs a day in court, they should be allowed to maintain their actions for damages.... A stay is appropriate."); *Traverso v. Penn,* 874 F.2d 209, 213 (4th Cir.1989) ("Under our decisions, the appropriate course is to abstain by staying proceedings on monetary as well as injunctive and declaratory claims."); *Stubbs v. Foley,* 998 F.2d 1010 (table), 1993 WL 261975, *2 (4th Cir.1993) ("Generally, when a plaintiff has failed to exhaust state court remedies, the case is dismissed rather than retained on the docket pending exhaustion. However, we direct the district court to stay this case pending exhaustion of state court remedies to guard against a statute of limitations problem." (internal citations omitted)); *Deakins v. Monaghan,* 484 U.S. 193, 202, 108 S.Ct. 523, 98 L.Ed.2d 529 (1988) (declaring that the Third Circuit's rule that district courts should stay rather than dismiss claims for damages is "sound"). Therefore, the Court will stay Plaintiff's claims based on the Noise Ordinances pending the outcome of the state proceedings.

2. The Public Speaking and Picketing Ordinances.

The Defendants contend that Plaintiff lacks standing to challenge the Public Speaking Ordinance and the Picketing Ordinances. "A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers National Union,* 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979). It is true that "[w]hen the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but

proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" *Id.* (quoting *Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973)). However, when plaintiffs "do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible," the mere existence of a law that causes them to "feel inhibited" does not give those plaintiffs standing. *Younger*, 401 U.S. at 42, 91 S.Ct. 746.[1] In cases where the Supreme Court has allowed plaintiffs to challenge statutes without being charged under them, the plaintiffs usually have shown a threat of prosecution. *Virginia v. American Booksellers Ass'n., Inc.*, 484 U.S. 383, 392, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988) (A law had very recently been passed that was "aimed directly at plaintiffs."); *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) ("Unlike three of the appellees in *Younger* [ ], petitioner ... has been twice warned to stop handbilling ... and has been told by the police that if he again handbills ... he will likely be prosecuted."). In short, "[t]he Supreme Court has made it abundantly clear that one challenging the validity of a criminal statute must show a threat of prosecution ... [and that] the threat must be credible." *Doe v. Duling*, 782 F.2d

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[1] The precise holding in *Younger* is that a law causing such inhibition does not give plaintiffs standing to invoke a federal court's equitable power to enjoin a pending state prosecution. *Younger*, supra. It was in *Babbitt* that the Supreme Court held that the existence of such a law does not confer standing on plaintiffs to challenge the law. *Babbitt, supra*, at 299, 99 S.Ct. 2301.

1202, 1205-06 (4th Cir.1986) (internal quotation marks omitted).

In the present case, Plaintiff has alleged no credible threat of prosecution under either the Picketing Ordinances or the Public Speaking Ordinance. With respect to the Picketing Ordinances, Plaintiff's conduct does not appear to violate the ordinances in any way. The Picketing Ordinances do not regulate what people say but merely prohibit people from blocking public right-of-ways. The pleadings make no mention of Plaintiff preaching with anyone else; therefore, his concerns about not being allowed to be abreast of a fellow speaker are not well founded. It simply stretches the imagination to see how Plaintiff's conduct violates the Picketing Ordinances, and since no government official has threatened to apply those ordinances to Plaintiff, there is no credible threat of prosecution. Therefore, Plaintiff lacks standing to make claims based on the Picketing Ordinances.

Although Plaintiff's conduct may have technically violated the now-repealed Public Speaking Ordinance, there was no credible threat of prosecution under that ordinance either. The language above from *Younger* makes it clear that a plaintiff must allege something beyond the mere existence of a law to establish a credible threat of prosecution. *See, Younger, supra.* In *Younger*, even the fact that California was prosecuting another person under the challenged law was not enough to show a credible threat of prosecution as to other plaintiffs. *Id.* Here, Plaintiff has made no allegation that the law was applied to anyone else or that anyone threatened to apply the law to him. As such, he lacks standing to challenge the Public Speaking Ordinance.

The Court understands that "when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who

is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-56, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988). Even if the repealed Public Speaking Ordinance did give "unbridled discretion" to a government official, the Court finds no precedent to support the notion that the relaxed standing requirement from *City of Lakewood* does away with the requirement that a plaintiff face a credible threat of prosecution. In fact, the reason for relaxing the standing requirement is to counteract the "chilling" effect which occurs when a censor with unbridled discretion "intimidates parties into censoring their own speech." *Id.*, at 757, 108 S.Ct. 2138. If there is no allegation that the plaintiff or anyone else will be prosecuted under a statute giving such discretion to a censor, then there cannot be the chilling effect that the relaxed standing requirement is meant to counteract. Here, Plaintiff has made no such allegation. Therefore, the relaxed standing requirement from *City of Lakewood* is unnecessary and inapplicable.

Even if Plaintiff could have challenged the Public Speaking Ordinance before it was repealed, the case clearly became moot when the Asheville City Council repealed the ordinance on October 14, 2003. Supreme Court cases on the issue of whether repealing an ordinance moots constitutional challenges to that ordinance have not been consistently decided. In one line of cases, the Supreme Court classified the repeal of an ordinance as "voluntary cessation" of a challenged action and held that, in general, repealing the challenged statute will not moot the case. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982); *Northeastern Florida Chapter of Associated Gen. Contractors of America v. City of*

Jacksonville, 508 U.S. 656, 662, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993). However, there are numerous Supreme Court cases that hold that repealing a challenged ordinance does, in fact, moot the challenge. *Diffenderfer v. Central Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414, 92 S.Ct. 574, 30 L.Ed.2d 567 (1972); *Bigelow v. Virginia*, 421 U.S. 809, 817-18, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975); *Kremens v. Bartley*, 431 U.S. 119, 129, 97 S.Ct. 1709, 52 L.Ed.2d 184 (1977); *Pope v. Illinois*, 481 U.S. 497, 501-02, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987); *Massachusetts v. Oakes*, 491 U.S. 576, 583-84, 109 S.Ct. 2633, 105 L.Ed.2d 493 (1989); *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 478, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990).

Lower courts have wrestled with this inconsistent precedent and have most often concluded that *Aladdin's Castle* and its progeny apply only when the legislative body that repealed the challenged statute gives a court reason to believe that it may reenact the statute or one substantially similar if the challenge is dismissed. *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 645 (6th Cir.1997) ("This exception properly applies only when a recalcitrant legislature clearly intends to reenact the challenged regulation"); *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir.1994) ("A statutory change ... is usually enough to render a case moot .... The exceptions to this general line of holdings are rare and typically involve situations where it is virtually certain that the repealed law will be reenacted"). In a lengthy discussion of the Supreme Court's puzzling inconsistencies, the Seventh Circuit noted that in both *Aladdin's Castle* and *Northeastern Florida* there was strong evidence that the Defendant cities either intended to reenact similar legislation or had already done so. *Federation of Adver. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 930

(7th Cir.2003). The Seventh Circuit further stated that although "some language in the *Aladdin's Castle* majority opinion perhaps suggests that mere repeal of a challenged statute does not moot a case [,] ... in light of both previous and subsequent cases, we find this language to be dicta and therefore not controlling." *Id.*, at 930 n. 5.

This Court comes to the same conclusion as the Seventh Circuit. Unless there is strong evidence that a legislative body intends to reenact a repealed statute or one that is substantially similar to it, repealing a statute will moot constitutional challenges to that statute. In the present case, Plaintiff has not alleged that the City Council plans to reenact the Public Speaking Ordinance or a similar law. Therefore, even if Plaintiff had standing to challenge the Public Speaking Ordinance before it was repealed, his challenge would now be moot.

In addition to arguing that repealing a statute is "voluntary cessation" of a challenged action and, therefore, does not render a case moot, Plaintiff argues that his constitutional challenge to the Public Speaking Ordinance is not moot because the challenged action is "capable of repetition yet evading review." Even when a plaintiff no longer has a concrete stake in the litigation, courts will continue to hear a case if "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975).

This doctrine, however, does not apply to the present case for several reasons. First, this case is no more "capable of repetition yet evading review" than any of the other cases discussed above where courts found that repealing a statute

rendered a challenge to that statute moot. Secondly, Plaintiff has alleged nothing to support a contention that the City may reenact the Public Speaking Ordinance or a similar statute. Therefore, there is no reasonable expectation that Plaintiff would be subjected to the same action again. Therefore, this case is not one that is "capable of repetition yet evading review."

Therefore, even if Plaintiff originally had standing to challenge the Public Speaking Ordinance, his challenges to the constitutionality and future existence of that ordinance would now be moot. Whether or not Plaintiff's claims for damages could survive as claims that seek "relief from alleged past rather than future unconstitutional action," *Clarkson v. Town of Florence*, 198 F.Supp.2d 997, 1004 (E.D.Wis.2002), is not for the Court to decide today since Plaintiff lacks standing in the first place.

3. The Asheville Police Department

The Defendants ask the Court to dismiss the claims against the Asheville Police Department because, under North Carolina law, the Asheville Police Department is not a "person" and, therefore, lacks the capacity to be sued. The Defendants' position is clearly supported by legal precedent, and the Plaintiff makes no argument to the contrary. *Coleman v. Cooper*, 89 N.C.App. 188, 192, 366 S.E.2d 2, 5 (1988). Therefore, the Asheville Police Department will be dismissed from this action.

4. Defendant Westbrook

The Defendants ask the Court to strike or dismiss the claims against City Manager James Westbrook, Jr., in his official capacity, as redundant since the Plaintiff is maintaining an action against the City itself. In a similar

scenario, the Fourth Circuit let stand a district court's decision to dismiss claims against government officials in their official capacities as redundant where the local governments were also defendants. *See, Brissett v. Paul*, 141 F.3d 1157 (table), 1998 WL 195945 (4th Cir.1998). The Court acknowledges Plaintiff's contention that this is not the proper motion in which the Defendants should argue that the claims are redundant; but whether or not Defendants have made the proper motion, the Court may strike redundant material from the pleadings. *See*, Fed.R.Civ.P. 12(f); *Coffman v. Wilson Police Dept.*, 739 F.Supp. 257, 262-63 (E.D.Pa.1990). Since there is no difference between suing Westbrook in his official capacity and suing the City itself, the Court orders the claims against Westbrook dismissed in the interest of judicial economy and efficiency. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).

B. Motions for preliminary injunctive relief and waiver of posting security to obtain preliminary injunctive relief.

Since all of Plaintiff's claims have been either dismissed or stayed, his motion for a preliminary injunction and his motion for waiver of posting security to obtain a preliminary injunction must be denied.

IV. ORDER

IT IS, THEREFORE, ORDERED that the Defendants' motion to dismiss is hereby ALLOWED IN PART AND DENIED IN PART as reflected in the Court's Judgment filed herewith.

IT IS FURTHER ORDERED that Plaintiff's motions for preliminary injunction and waiver of posting security to obtain a preliminary injunction are hereby DENIED as moot.

JUDGMENT

For the reasons set forth in the Memorandum of Opinion filed herewith,

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the Defendants' motion to dismiss Plaintiff's complaint as to all claims involving the City of Asheville's Public Speaking and Picketing Ordinances is ALLOWED, and such claims are hereby DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants' motion to dismiss Plaintiff's complaint as to claims involving the City of Asheville's Noise Ordinances is DENIED, and such claims are hereby STAYED pending the outcome on state court proceedings.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants' motion to dismiss Plaintiff's claims against Defendants Westbrook and the Asheville Police Department is ALLOWED, and the claims against these Defendants are hereby DISMISSED WITH PREJUDICE.

The Clerk is directed to remove this case from the Court's active docket and place same on the inactive docket until the conclusion of state proceedings. The parties are directed to notify the Court by the filing of an appropriate pleading when such proceedings are completed and the matter is appropriate for this Court's review.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-1003
Filed February 23, 2005

CARROLL MOORE,
Plaintiff-Appellant,

v.

CITY OF ASHEVILLE, NORTH CAROLINA; JAMES L. WESTBROOK, JR. in his official capacity as the City Manager of Asheville, North Carolina; ASHEVILLE POLICE DEPARTMENT,
Defendants-Appellees.

On Petition for Rehearing En Banc

The appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for a panel composed of Judge Niemeyer, Judge Luttig, and judge King.

For the Court,

/s/ Patricia S. Connor
CLERK

(2)
No. 04-1593

FILED
JUN 27 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CARROLL MOORE,

Petitioner,

v.

CITY OF ASHEVILLE,
NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether a defendant in a coercive state administrative proceeding is required under the *Younger* doctrine to exhaust state administrative and judicial remedies, or is permitted to bypass these remedies in favor of a federal court action seeking to effectively annul the results of the state administrative body.

2. Whether a federal court should abstain under the *Younger* doctrine from hearing a federal claim when the federal plaintiff has failed to exhaust state administrative remedies and judicial review, and has defaulted on the opportunity to do so.

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STATEMENT OF THE CASE

The opinion of the Fourth Circuit Court of Appeals accurately sets forth the facts and procedural history of this case. Petitioner is a street preacher who was twice cited for violating the City of Asheville's noise ordinance. Petitioner did not pursue the available avenue of appeal through the City's administrative process under the ordinance, nor did he seek state court judicial review of any final administrative decision, as permitted by statute. N.C. Gen. Stat. § 1-269. Rather, he paid the tickets, let the deadlines for appeal elapse, and then filed suit in federal court alleging that the City had violated his constitutional rights. Among other things, he sought: (1) a declaration that the City had, on two occasions, unlawfully obstructed his constitutional rights, and (2) direct and consequential damages resulting from the City's conduct. Pet. App. 2a - 7a.

Petitioner suggests that the "thrust and focus" of his complaint was to seek prospective relief. Pet. 5. This characterization of the complaint is inaccurate. As the Court of Appeals explained, the complaint clearly "seeks to annul the effects of the prior state administrative proceeding" through a declaration that the City unconstitutionally violated Petitioner's rights in the past. Pet. App. 21a. Further, the complaint, as drafted, sought direct and consequential monetary damages from the City for its past conduct. *Id.*

The City filed a motion to dismiss based upon the *Younger* abstention doctrine. *Younger v. Harris*, 401 U.S. 37 (1971). The district court ruled that *Younger*

applied, precluding the injunctive and declaratory relief sought. However, the trial court found that *Younger* abstention did not encompass Plaintiff's claims for money damages and so stayed Plaintiff's claims for money damages pending the conclusion of state proceedings under the noise ordinance.

Petitioner appealed, contending that *Younger* abstention was inappropriate because the state proceeding was final and nonappealable. Pet. App. 10a. Petitioner also argued that the complaint sought prospective relief against future enforcement of the noise ordinance, rendering *Younger* inapplicable. Pet. App. 20a.

The Court of Appeals affirmed the trial judge, based upon this Court's decisions in *Huffman v. Pursue*, 420 U.S. 592 (1975) and *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986). Judge Niemeyer's opinion, which was joined in by Judges Luttig and King, held that a defendant to a coercive state administrative proceeding must exhaust his state administrative and judicial remedies and may not bypass them in favor of a federal court proceeding in which he seeks effectively "to annul the results" of a state administrative body. Pet. App. 3a. The Court of Appeals found that Petitioner's complaint sought to annul City administrative proceedings by seeking a declaratory judgment that the City had unconstitutionally applied its ordinances to Petitioner and by demanding consequential damages. Pet. App. 21a. Thus, *Younger* barred the federal court action. The trial judge was instructed to dismiss the case, as the avenues for administrative and judicial appeal were no

longer available to Petitioner due to Petitioner's inaction. Pet. App. 22a - 23a. Petitioner sought an *en banc* review, but no member of the Court requested a poll on the petition for rehearing. Pet. App. 42a.

REASONS FOR DENYING THE PETITION

This litigation does not warrant the Court's review. Although Petitioner contends that the Fourth Circuit decision conflicts with decisions from other circuits, the extent of the conflict has been greatly exaggerated and is insufficient to justify certiorari. The Fifth Circuit's decision in *Thomas v. Texas State Bd. of Medical Examiners*, 807 F.2d 453 (5th Cir. 1987) is stale and discredited. All of the recent decisions from other circuits represent a clear consensus on the question presented, one entirely consistent with this Court's precedents. If the Fifth Circuit heard the *Thomas* case today, it would likely be decided differently due to developments in the law during the past eighteen years. Moreover, Petitioner's attempt to portray this litigation as being of great importance is overblown, as this ruling applies only to a narrow category of litigants who abandon available avenues of appeal in the state court system in favor of duplicative federal claims.

I. THERE IS NO NEED FOR THE COURT TO RESOLVE THE PURPORTED CIRCUIT SPLIT AT THIS TIME.

The conflict in the decisions of the Circuit Courts was overstated in the petition. A clear consensus has evolved during the past fourteen years in all of the

circuit decisions on point. There is no need for a Supreme Court ruling on this issue, as there is no confusion in the circuits. The Fifth Circuit decision in *Thomas* and the Sixth Circuit decision in *Norfolk & Western Railway Co. v. Public Utilities Comm'n. of Ohio*, 926 F.2d 567 (6th Cir. 1991) (hereafter "*PUCO*") are outdated, isolated aberrations without apparent weight of authority, and will likely be overturned in light of developments since they were decided.

The petition contends that there is a 3 - 3 split in the circuits on this issue, i.e. opinions from the Fifth, Sixth and Eleventh Circuits conflict with those of the Third, Fourth and Eighth Circuits. Petitioner relies solely upon *Thomas* and *PUCO*. No Eleventh Circuit case on point was cited. Petitioner apparently believes that the Eleventh Circuit would follow the Fifth Circuit's decision on this issue. Pet. at 8. However, in *Bonner v. Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent only the Fifth Circuit decisions issued prior to September 30, 1981. The *Thomas* decision was not rendered until 1987, six years later, and therefore need not bind the Eleventh Circuit.[1]

Petitioner acknowledges two precedents from other circuits on all fours with the Fourth Circuit decision here: *O'Neill v. City of Philadelphia*, 32 F.3d 785 (3rd Cir.

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[1] Only one pre-1981 case from the Fifth Circuit was cited in the petition. *Concerned Citizens of Vicksburg v. Sills*, 567 F.2d 646 (5th Cir. 1978). *Sills* turned upon *Younger* abstention issues involving criminal prosecutions, not appeals from administrative agencies. No case from the Eleventh Circuit holds in harmony with *Thomas* and *PUCO*.

1994), *cert. denied*, 514 U.S. 1015 (1995) and *Alleghany v. Pomeroy*, 898 F.2d 1314 (8th Cir. 1990). The petition neglects to mention three additional circuit court decisions in accord. *Majors v. Engelbrecht*, 149 F.3d 709 (7th Cir. 1998), *Maymo-Melendez v. Alvarez-Ramirez*, 364 F.3d 27 (1st Cir.), *cert. denied*, 125 S. Ct. 110 (2004) and *Alleghany v. McCartney*, 896 F.2d 1138 (8th Cir. 1990) (decided with *Pomeroy, supra*).

The purported conflict in the circuits has already resolved itself - without the need for this Court's intervention.

The *Thomas* case has been widely discredited in many decisions during the past eighteen years. In *Thomas*, the Fifth Circuit held that *Younger* abstention did not preclude a doctor's federal court challenge to a state medical board's final decision revoking his license. The *Thomas* court noted the Supreme Court's decision in *Huffman*, but drew a distinction between that case and the *Thomas* case on the grounds that no state court trial had yet taken place. *Thomas*, 807 F.2d at 455-6. The *Thomas* court concluded that a party to a coercive administrative proceeding need not seek judicial review of the final agency decision, but instead could file a federal court case seeking to nullify the results of the administrative proceeding. *Id.* at 456-7.

Eleven years later, the Seventh Circuit considered a similar federal court challenge to a state medical board's decision regarding licensure of a health care worker. *Majors, supra*. However, the *Majors* court held that *Younger* abstention barred federal court review of this state administrative proceeding. The Seventh

Circuit acknowledged *Thomas*, but found it "unpersuasive" as it was constructed entirely upon a distinction drawn between the decisions of administrative agencies and state courts. This distinction was plainly "immaterial," especially in light of the Supreme Court's decision in *New Orleans Public Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 369, n. 4 (1989) (hereafter *NOPSI*), which had been issued two years after *Thomas*. *Majors*, 149 F.3d at 713.

In 1994, the Third Circuit also considered and expressly rejected *Thomas*, relying instead upon the Supreme Court's reasoning in *Huffman*. In *O'Neill*, the administrative proceeding at issue had become final because the losing parties did not request state court judicial review, but circumvented the state court by filing a federal lawsuit. The *O'Neill* court held that *Younger* precluded this federal court challenge to a state administrative determination. *O'Neill*, 32 F.3d at 791.

Like the instant case, *O'Neill* involved a challenge to the constitutionality of actions taken by a city in the enforcement of a city ordinance. Because the litigants paid their tickets without appealing to state court, *Younger* barred their later federal court challenge to the constitutionality of the city's actions. The *O'Neill* Court rejected the holding of *Thomas*, finding no meaningful distinction between litigants who chose not to appeal state agency decisions and those who abandon available appeals of state court decisions. The Court stated, "We have been given no reason why a litigant in a state administrative proceeding should be permitted to forego state-court judicial review of the

agency's decision in order to apply for relief in federal court." *Id.* at 790-1.

O'Neill further undermined *Thomas* by pointing out that the Eighth Circuit had also disregarded *Thomas* in *Pomeroy*. *Id.*, citing *Pomeroy, supra.* There the Eighth Circuit did not expressly mention *Thomas,* which had been decided three years earlier, but it clearly rejected the *Thomas* reasoning. Like *O'Neill,* the *Pomeroy* court held that *Younger* abstention barred a federal court lawsuit challenging the constitutionality of a state administrative determination, where the litigant chose not to pursue an available avenue for judicial review in the state courts. *Pomeroy,* 898 F.2d at 1317-18, *see McCartney,* 896 F.2d at 1144 (8th Cir. 1990) ("Since *Huffman,* courts have consistently held that a party cannot avoid *Younger* by choosing not to pursue available state appellate remedies.")

More recently, the First Circuit rejected the *Thomas* decision, calling it a minority view that had been rejected by other circuits. *Maymo,* 364 F.3d at 35, n. 9. The First Circuit aligned itself with the Third, Seventh and Eighth Circuits in the *O'Neill, Majors* and *McCartney* decisions, seeing no reason for "an automatic right to detour into federal court because unhappy with an initial answer" from a state agency. *Id.* at 35.

The Ninth Circuit has also disagreed with *Thomas,* although that opinion was later withdrawn. *Nevada Entertainment Industries v. City of Henderson,* 8 F.3d 1348 (9th Cir. 1993), *withdrawn and reh'g granted by,* 21 F.3d 895 (9th Cir. 1994), *later decided by,* 26 F.3d 131 (9th Cir.

1994) (affirming the district court's dismissal of plaintiff's claim on other grounds, and dismissing the city's challenge of the district court's refusal to abstain as moot), *cert. denied*, 513 U.S. 1078 (1995). In the withdrawn opinion, the Ninth Circuit found that *Younger* barred an action challenging the constitutionality of a zoning ordinance. The federal plaintiff had failed to appeal a city zoning decision to the state court, opting to wait until that decision became final, then filing a federal court lawsuit. The Ninth Circuit applied *Younger*, based upon a careful review of Supreme Court decisions, stating: "It is consistent with both *Younger* and *Patsy* for a federal court to abstain from intervening where an administrative proceeding has been initiated by the state to enforce state law even if those proceedings have concluded, where adequate state judicial review was available to the federal plaintiff." *Id.* at 1351-52 (discussing *Younger* and *Patsy v. Board of Regents of State of Fla.*, 457 U.S. 496 (1982)).

Numerous lower courts have added to the lopsided weight of authority against *Thomas*. *See, e.g. Phillips v. Virginia Bd. of Medicine*, 749 F. Supp. 715, 728 (E.D. Va. 1990) (noting that the Supreme Court's *NOPSI* decision directly contradicted *Thomas* and finds the effort in *Thomas* to distinguish *Huffman* "unconvincing"); *Harper v. Public Service Commission of West Virginia*, 291 F. Supp. 2d 443, 458 (S.D.W.Va. 2003), *rev'd on other grounds*, 396 F.3d 348 (4th Cir. 2005) (agreeing that *Thomas* is "unpersuasive and distinguishable"); *Murphy v. City of Manchester*, 70 F. Supp. 2d 62, 68 (D. N.H. 1999) (rejecting *Thomas* and holding that failure to appeal an administrative decision meant that state

proceedings were pending for purposes of the *Younger* doctrine); *Bongiorno v. Lalomia*, 851 F. Supp. 606, 613 (D. N.J. 1994) (noting *Thomas*, but then applying *Younger* to a final decision of a state administrative proceeding because there was a right to appeal to the state court); *Fore Way Express, Inc. v. State of Wisconsin*, 660 F. Supp. 310, 313 (E.D. Wis. 1987) (distinguishing *Thomas); Communication Telesystems Internat'l v. California Public Utilities Comm'n*, 14 F. Supp. 2d 1165, 1169 (N.D. Cal. 1998) (distinguishing *Thomas*); and *Moore v. City of Asheville*, 290 F. Supp. 2d 664, 667 (W.D.N.C. 2003) *affirmed and remanded*, 396 F.3d 385 (4th Cir. 2005) (the instant case).

The only other case cited by Petitioner, *PUCO*, does not offer *Thomas* any real support. The Sixth Circuit's reasoning on this issue in *PUCO* had no legs of its own, but rested entirely upon the rubric of *Thomas*. As *Thomas* has been roundly rejected, so too must *PUCO* fall. Further, the *PUCO* Court had an additional basis for declining to abstain: federal preemption. 926 F.2d at 573.

The holding of *PUCO* has further been called into question by a recent Sixth Circuit *en banc* ruling. *Tesmer v. Granholm*, 333 F.3d 683 (6th Cir. 2003), *rev'd on other grounds, Kowalski v. Tesmer*, __ U.S. __, 125 S. Ct. 564 (2004). The *Tesmer* court's analysis was solidly based upon this Court's ruling in *Huffman*. Although *Tesmer* involved the application of *Younger* to court proceedings instead of administrative proceedings, the reasoning was clear: the determining factor was whether the federal plaintiff had exhausted his avenues of appeal, not whether the state proceeding was final.

The court equated the plaintiff's choice not to appeal the unfavorable administrative outcome to a failure to exhaust his remedies. His federal court lawsuit was therefore barred. In no uncertain terms, the *Tesmer* court found that the state proceeding remained pending for *Younger* purposes "until a litigant has exhausted his state appellate remedies," even in cases "where a litigant has abandoned pursuit of state court relief." *Id.* at 689.

Petitioner not only claims this case results in an inter-circuit conflict, he also attempts to contrive an intra-circuit conflict. The petition cites one Fourth Circuit decision as conflicting with the decision below. Pet. 12 - 13. The weakness of this argument is self-evident: the supposedly conflicting decision is an unpublished summary disposition. *Sofer v. State of North Carolina Hertford Police Dept.*, 935 F.2d 1287 (4th Cir. 1991) (unpublished). In accordance with the Fourth Circuit Rules, unpublished dispositions like *Sofer* need not recite all of the relevant facts. 4th Cir. R. 36(b). Citation of unpublished dispositions is disfavored in the Fourth Circuit because these cases do not have precedential value. *Id.*, R. 36(c). Therefore, the unpublished opinion in *Sofer* cannot create an intra-circuit conflict with the published decision of the esteemed panel here. Pet. App. 42a.

The petition relies in a puzzling way on *Wooley v. Maynard*, 430 U.S. 705 (1977), a decision that does not fit the facts of this case. Pet. 21-23. As the court below correctly pointed out, the complaint here sought damages and a declaration that the City had violated Petitioner's constitutional rights. *Wooley* applies only

to cases seeking "wholly prospective" relief. *Id.* at 711. Petitioner's reliance on *Wooley* is not apt.[2]

Precious little is required to attain total harmony in the circuits about the application of *Younger* to appeals from the decisions of administrative agencies, in accordance with this Court's decisions in *Huffman, Dayton Christian Schools* and *NOPSI*. Five circuits have forged the judicial consensus reflected in the decision below. This prevailing majority view is now fully evolved in accordance with this Court's rulings. The now-outmoded minority view pressed by Petitioner is extant, if at all, in only two circuits, by reason of decisions issued eighteen and fourteen years ago. Based upon the impressive array of authority against *Thomas*, the Fifth Circuit will no doubt soon correct its course by reconsidering this obsolete ruling. The Sixth Circuit has already realigned its position through its *en banc* ruling in *Tesmer*.

Surely many other petitions before this Court pose more pressing and important issues. This Court's scarce resources should be devoted to cases presenting direct, vital and intolerable conflicts.

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[2] Petitioner's effort to recast the complaint to his liking cannot morph it into an important issue of federal law. If Petitioner were correct in saying that his complaint sought "wholly prospective relief" under *Wooley* and the Fourth Circuit erred in finding otherwise, then this case would be fact-bound. *Id.* at 711. In other words, if the petition is grounded on a claim that the Fourth Circuit erred on the facts - which it plainly did not - this error would be inconsequential and certiorari should be denied. No troublesome questions or conflicting precedents are posed in connection with the *Wooley* exception to *Younger*.

II. THE DECISION BELOW IS PLAINLY CORRECT.

The Fourth Circuit decision stands upon the firm foundation of this Court's *Younger* abstention jurisprudence. This Court's decisions in *Huffman* and *Dayton Christian Schools* serve as beacons that clearly guided this decision. Judges Niemeyer, Luttig and King painstakingly analyzed this Court's precedents and carefully applied them to the facts of the case. The result is a decision that is not only faithful to this Court's rulings, but also reflects the clear consensus forged in the circuits. In stark contrast, the *Thomas* decision urged by the petition continues to founder on the shoals of unpersuasive reasoning and immaterial distinctions.

The *Younger* doctrine is driven by the self-imposed rule of judicial restraint known as comity. Strong policies counsel against the exercise of jurisdiction where comity would be offended. *Dayton Christian Schools*, 477 U.S. at 626. This Court has charted a safe course away from these shoals by enumerating the core *Younger* concerns to be considered: (1) whether the federal action was duplicative, (2) whether the action would cast a direct aspersion on the capabilities and good faith of state appellate courts, (3) whether the action would disrupt the state's efforts to protect its important interests, and (4) whether the action was designed to annul the results of the state proceeding. *Huffman*, 420 U.S. at 608-9.

These core concerns are not the only directions provided by this Court. In a long series of cases

following *Younger*, this Court delineated unambiguous guideposts defining when and how *Younger* should be applied. *Huffman, supra.* (civil nuisance proceedings); *Juidice v. Vail*, 430 U.S. 327 (1977) (civil contempt proceedings); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (attachment proceedings); *Moore v. Sims*, 442 U.S. 415 (1979) (child custody proceedings); and *Middlesex County Ethics v. Garden State Bar Ass'n*, 457 U.S. 423 (1982) (bar disciplinary proceedings). In particular, this Court held that *Younger* applied to state administrative proceedings, like the City's noise ordinance process here. *Dayton Christian Schools*, 477 U.S. at 628.

The Fourth Circuit did not take a new direction, stray off course or blaze a new trail here. It simply followed the course clearly charted by this Court and mirrored in the decisions of its sister circuits. The Fourth Circuit's decision is commendably thorough in its analysis, and did not miss one jot in explaining how this Court's rulings were considered and applied. However, there is not much here that is new or commands special attention from the Supreme Court.

The outcomes in these cases are predictable, sensible and practical and are solidly based upon both Supreme Court precedents and the judicial consensus in the circuits. If a defendant to a coercive administrative proceeding abandons an available avenue of appeal, *Younger* will bar a federal action that seeks effectively to annul the results of that administrative proceeding. There is no genuine split of authority, no divergence from this Court's precedents and no need for this Court to review this case.

III. PETITIONER VASTLY OVERSTATES THE IMPORTANCE OF THIS CASE.

This case applies only to one narrowly confined category of litigants: those who wish to short-circuit administrative proceedings and state-court judicial review by making federal cases out of their claims. Pet. App. 19a. It affects only those who have abandoned an available avenue of appeal in state courts because they prefer a federal court forum. Pet. App. 3a. Opening federal venues for forum-shoppers is hardly a top priority for the administration of justice. And this Court need not shield those who choose to default on their rights from the consequences of their inaction. This case simply does not merit further review.

Petitioner's challenge to the City's actions in enforcing its noise ordinance belonged in the state judicial system. If Petitioner was unhappy with the City's final decision, he was entitled to judicial review in state court. After all, the state court is primarily responsible for reviewing and overseeing state agencies.[3]

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[3] Petitioner seems to argue that the city noise ordinance overrides this Court's *Younger* decisions and controls which court system is empowered to judicially review the city's decisions. Pet. 15, 19, 26. It is axiomatic that a local ordinance issued by a city council cannot change *Younger* doctrine. No city council can, by its own authority, take away from the state court the ability to correct constitutionally infirm city decisions and give this power instead to a federal court. Nor can a city council, expand, contract or alter the proper scope of the exercise of jurisdiction by a federal court.

In its concluding paragraph, the petition asks this Court to "grant review to protect the rights of federal plaintiffs to have their constitutional rights protected by the federal court." Pet. 27. This request suggests that Petitioner may assume that he has a right to vindicate his federal claims in a federal forum. However, this Court has repeatedly - and again very recently - explained that this assumption is not well founded. *San Remo Hotel, L.P. v. City and County of San Francisco*, ___ U.S.___, 2005 WL 1421451, at *1 (June 20, 2005) (state proceedings can "deprive plaintiffs of the 'right' to have their federal claims relitigated in federal court," even when the plaintiff "would have preferred not to litigate in state court").

Furthermore, state courts have the solemn responsibility, equally with the federal courts, to guard, enforce, and protect every right granted or secured by the U.S. Constitution. *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974). For the vigilant party who pursues every available remedy, *Younger* abstention does not impair their constitutional rights. After all, the state courts that oversee these administrative determinations have inherent authority and are competent to adjudicate claims arising under the laws of the United States. *Tafflin v. Levitt*, 493 U.S. 455 (1990); *See The Federalist*, No. 82.

Petitioner did not need to file a federal lawsuit to protect or vindicate his constitutional rights because he could have exhausted his administrative remedies, and then, if still unsatisfied, obtained judicial review in state court. By choosing not to pursue his appeal, he abandoned those rights. The mere fact that Petitioner

wanted a second bite at the apple - and wanted to chew it in federal court - does not mean that this is guaranteed by "Our Federalism."

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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No. 04-1593

IN THE

Supreme Court of the United States

CARROLL MOORE,

Petitioner.

v.

CITY OF ASHEVILLE, NORTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I.

THE CIRCUIT COURTS ARE SPLIT ON THE APPLICABILITY OF *YOUNGER* ABSTENTION WHEN A STATE PROCEEDING HAS BECOME FINAL.

Respondent does not deny the existence of a Circuit split on the issue presented by this Petition. Respondent's argument is limited to the contention that the Circuit split is not worthy of resolution because the cases supporting Petitioner are, according to Respondent, stale and the cases opposing Petitioner have developed a consensus among themselves. Respondent also contends that the Circuit split is not worthy of resolution because the Circuits opposing Petitioner have criticized the reasoning of the Circuits supporting Petitioner's arguments in this case. Respondent also states that Petitioner has missed Circuit court cases that state the majority position. All Respondent has done is to highlight the existence of the Circuit split that exists on the issue presented in the Petition and also highlighted the fact that the split actually exists and needs resolution.

This Court candidly stated that the issue presented by this case has never been squarely addressed. *See New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 369 n.4 (1989). However, the issue has been addressed squarely by several lower courts, with divergent results.

As Respondent has acknowledged, the Fifth and Sixth Circuits (and the Eleventh Circuit by importation of the Fifth's precedent) clearly hold that when state proceedings

have become final, *Younger* abstention is not appropriate even though state judicial remedies were available to a plaintiff. *See Thomas v. Texas State Board of Medical Examiners*, 807 F.2d 453 (5th Cir. 1987); *Concerned Citizens of Vicksburg v. Sills*, 567 F.2d 646 (5th Cir. 1978)[1]; *Norfolk & Western Railway Co. v. Public Utilities Comm'n. of Ohio ("PUCO")*, 926 F.2d 567 (6th Cir. 1991).

In contrast, other Circuit courts have held that a plaintiff is required to exhaust all judicial remedies in order to bring suit in federal court, and that if some state remedy is available to the plaintiff, *Younger* abstention is appropriate even if the state proceedings are final. *See O'Neill v. City of Philadelphia*, 32 F.3d 785 (3d Cir. 1994); *Allegheny Corp v. Haase*, 896 F.2d 1046 (7th Cir. 1990); *Allegheny Corp. v. Pomeroy*, 898 F.2d 1314 (8th Cir. 1990).

Petitioner did not ignore cases as the Respondent suggests. The First Circuit case of *Maymo-Melendez v. Alvarez-Ramirez*, 364 F.3d 27 (1st Cir. 2004) is inapposite. In that case, *Maymo* brought a federal lawsuit to challenge the suspension of his horse training license. At the time of the filing of the federal lawsuit, *Maymo's* license had been suspended by the Racing Administrator under one case. *Id.* at 30. *Maymo* filed the federal lawsuit and, two days later, petitioned the Racing Board for review of the Racing Administrator's suspension. *Id.* The Racing Administrator returned the petition for review because of the federal court

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[1] Because the *Sills* case was decided prior to 1981, it is binding precedent in the Eleventh Circuit. *See Bonner v. Pritchard*, 661 F.2d 1206 (11th Cir. 1981). The Eleventh Circuit has no precedent to the contrary of *Sills*. *Sills* remains the rule in that Circuit. Therefore, the Circuit split in this case encompasses the Eleventh Circuit together with the Fifth and Sixth Circuits.

litigation. *Maymo* also had another case pending where the Racing Board had suspended his license for five years. *Maymo* sought review of that action in the state court. The state court affirmed the suspension and *Maymo* filed a petition for reconsideration. *Id.* at 32. *Maymo* then filed a second federal lawsuit while his petition for reconsideration was pending. *Id.* The First Circuit held that abstention under *Younger* was appropriate because both state cases were pending at the time of both federal lawsuits. In the first case, *Maymo* had petitioned the Racing Board to review the Administrator's decision to suspend his license. In the second case, *Maymo* had an ongoing state appeal petition for reconsideration pending.

The First Circuit distinguished a previous case entitled *Kercado-Melendez v. Aponte-Roque*, 829 F.2d 255 (1st Cir. 1987). In that case, Kercado was terminated from her teaching position. *Id.* at 257-58. The order said it would take effect ten days after receipt unless Kercado chose to appeal to the Board of Appeals for the Public Education System. *Id.* Kercado instead filed a federal lawsuit. The First Circuit held abstention under *Younger* was inappropriate.

In reconciling *Kercado* and *Maymo*, the First Circuit stated, "There is a spectrum stretching from *Huffman [v. Pursue*, 420 U.S. 592 (1975)] to *Patsy [v. Board of Regents*, 457 U.S. 496 (1982)] and *Kercado-Melendez* may be in the middle; but Maymo's situation is clearly at the *Huffman* end.

Factually, *Maymo* is distinguishable from the present case. In *Maymo*, the state cases were pending at the time of the federal lawsuits. One was pending before the Racing Board and one was pending before the state court of appeals. In the present case, Petitioner's state administrative proceedings were final and there were no pending state court proceedings. Factually, *Maymo* is inapposite from the present case.

Further, *Majors v. Engelbrecht*, 149 F.3d 709 (7th Cir. 1998), is also inapposite. In that case, a hospital had suspended Majors' nursing license. In mid-November, 1995, the State Board of Nursing set a hearing on the revocation of the license for December 18, 1995. *Id.* at 711. A few days after the hearing was set, Majors filed a federal lawsuit seeking to enjoin the revocation of his license. *Id.* In the midst of the federal case, the State Board revoked Majors' license and Majors filed a petition in state court asking the state court to reinstate his license. *Id.* at 712. The Seventh Circuit abstained under the principle that the state case was clearly ongoing at the time of the federal lawsuit. *Id.* at 713.

Majors is clearly inapposite because the administrative proceeding was not final and a state court review proceeding was filed in the midst of the federal lawsuit.

Respondent contends that Petitioner also neglected to mention the case of *Allegheny Corp. v. McCartney*, 896 F.2d 1138 (8th Cir. 1990). However, Petitioner did mention the Eighth Circuit case of *Allegheny Corp. v. Pomeroy*, 898 F.2d 1314 (8th Cir. 1990), which was a companion case decided the same day as *McCartney*. The rule announced in *Pomeroy* was the same rule announced and applied in *McCartney*. The Eighth Circuit's position on the issue presented in this case is clear and stands in opposition to the Fifth, Sixth and Eleventh Circuit's position.

Contrary to Respondent's argument, the Fifth and Sixth Circuit decisions are not stale. The Fifth and Sixth Circuit cases are considered settled law in those circuits. The precedents have not become stale. The Fifth Circuit's decision in *Thomas* relied upon the previous case of *Concerned Citizens of Vicksburg v. Sills*, 567 F.2d 646 (5th Cir. 1978). *Sills* has been cited with approval in the Fifth Circuit. *See Louisiana Debating and Literary Ass'n. v. City of New*

Orleans, 42 F.3d 1483 (5th Cir. 1995); *Giles v. City of Prattville*, 556 F. Supp. 612 (M.D. Ala. 1983). Further, *Thomas* has been cited with approval in the Fifth Circuit. *See Geotes v. Mississippi Bd. of Veterinary Medicine*, 986 F. Supp. 1028 (S.D. Miss. 1997). Neither *Thomas* nor *Sills* have been overruled or questioned by the Fifth Circuit. Far from being stale, the two cases have become settled precedent in the Fifth Circuit.

Additionally, the Sixth Circuit's precedent is not stale. The *PUCO* case has not been overruled and continues as good precedent in the Sixth Circuit. Contrary to Respondent's argument, the *PUCO* case has not been called into question by *Tesmer v. Granholm*, 333 F.3d 683 (6th Cir. 2003)(en banc). *Tesmer* is inapposite. In *Tesmer*, three indigent defendants in state criminal proceedings and two attorneys regularly appointed as defendant's counsel filed suit against a Michigan statute that prohibited the appointment of counsel for an indigent defendant on appeal if the defendant pled guilty or nolo contendere. *Id.* at 686. The Sixth Circuit held abstention was appropriate as to one of the criminal defendants because, even though his application for leave to appeal was denied, under Michigan's procedural rules, he had a certain time period to file for leave to appeal with the Michigan Supreme Court. *Id* at 689. Instead of filing with the Michigan Supreme Court, the defendant filed the federal lawsuit. The Sixth Circuit held that abstention was appropriate because, by seeking injunctive relief, the defendant was attempting to obtain federal review of state proceedings before the state proceedings were fully decided. *Id.*

The *Tesmer* case never even cited *PUCO* in its discussion whether the state court cases were ongoing. Further, *PUCO* addressed the question of when a state administrative

proceeding had become final, but no state court action had been instituted to review the administrative proceeding. That is a different case than *Tesmer* where state court proceedings were clearly pending at the time of the federal lawsuit. *Tesmer* in no way calls into question the Sixth Circuit's decision in *PUCO* and *PUCO* has in no way been overruled or called into question by the Sixth Circuit.

The bare fact that the Circuits in opposition to the Fifth, Sixth and Eleventh Circuits have developed a consensus among themselves is irrelevant to the existence of the Circuit split that still exists and needs resolution by this Court. Simply because some of the Circuits have criticized the reasoning of other Circuits does not mean that a split does not exist. In fact, criticism of the Fifth and Sixth Circuit's decisions in *Thomas, Sills,* and *PUCO* highlights that the Circuit Courts are in disagreement as to the application of *Younger* abstention when state administrative proceedings are final and no state court action is instituted to review those proceedings, but a federal lawsuit is filed. The Fifth and Sixth Circuits (and the Eleventh by importation of the Fifth's precedent in *Sills*) have remained impervious to the criticism leveled by some of the Circuits who stand in opposition to the rules in those cases.

Respondent also argue that the Fourth Circuit's decision in *Sofer v. State*, 935 F.2d 1287, 1991 WL 107545 (4th Cir. 1991), should be disregarded because it is an unpublished decision of no precedential value in the Fourth Circuit. This is not true under the Fourth Circuit's rules for citation of unpublished decisions. While citation to an unpublished decision is normally disfavored, the Local Rules of the Fourth Circuit state:

> If counsel believes, nevertheless, that an unpublished disposition of this Court has precedential value in

> relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court.

Fourth Circuit Local Rule 36(c). In the present case, the *Sofer* decision has precedential value for the abstention issue and there is no other published decision in the Fourth Circuit that serves as well to highlight the internal inconsistency in the Fourth Circuit on this issue. The *Sofer* decision may be cited in the Fourth Circuit as precedent and thus should be considered by this Court in deciding whether to accept this Petition. *Sofer* stands in direct conflict with the present case in the Fourth Circuit. The two cannot be reconciled. Thus, the Fourth Circuit is even at odds with itself over the issue presented in the Petition.

Petitioner has not overblown the conflict in the Circuits on this issue. The Fifth, Sixth and Eleventh Circuits (and one decision in the Fourth Circuit) stand in direct opposition to the Third and Eighth Circuits which are in agreement with the Fourth Circuit (in this case) on the issue presented in this Petition. Respondent has done nothing but to highlight the split that is evident in the lower courts on the issue presented in this case.

II.

THE ISSUE PRESENTED IN THE PETITION IS ONE OF GREAT PUBLIC IMPORTANCE THAT THE DISTRICT COURT INCORRECTLY DECIDED.

Respondent contends that this case is unimportant because it applies to "one narrowly confined category of litigants." *See*

Brief in Opp. at 14. However, as demonstrated above, the lower courts are split over the application of *Younger* abstention to litigants whose state administrative proceedings have become final and whose avenues for appeal in the state court system have expired. This Court has never squarely confronted that question. *See New Orleans Public Service, Inc. v. Council of the City of New Orleans ("NOPSI")*, 491 U.S. 350, 369 n.4 (1989). However, at the time of this Court's decision in *NOPSI*, the Fifth Circuit had decided *Concerned Citizens of Vicksburg v. Sills*, 567 F.2d 646 (5th Cir. 1978), and *Thomas v. Texas State Board of Medical Examiners*, 807 F.2d 453 (5th Cir. 1987).

There is a "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976). This obligation, coupled with this Court's acknowledgment that "the relevant principles of equity, comity, and federalism have little force in the absence of a state proceeding," *Huffman v. Pursue*, 420 U.S. 592, 602-03 (1975) (quoting *Steffel v. Thompson*, 415 U.S. 452, 462 (1974)), counsel for acceptance of the Petition and reversal of the Fourth Circuit. This Court stated very clearly, "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction ... **The right of a party plaintiff to choose a Federal court where there is a choice cannot properly be denied.**" *NOPSI*, 491 U.S. at 358-59 (emphasis added). Abstention should only be exercised in a very clear category of cases outlined by the Court and abstention remains "the exception and not the rule." *Id.* (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984)). This Court has stated:

> When no state criminal proceeding is pending at the time the federal complaint is filed, federal

> intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state courts' ability to enforce constitutional principles.

Huffman, 420 U.S. at 603 (quoting *Steffel*, 415 U.S. at 462). This rule is true even when the federal court may have some affect on a state proceeding in terms of disagreeing with the result reached.

> It is true, of course, that the federal court's disposition of such a case may well affect, or for practical purpose preempt, a future - or, as in the present circumstances, even a pending - state court action. But **there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts.**

NOPSI, 491 U.S. at 373 (emphasis added). In *Younger*, the concerns were federalism and comity and preventing a federal court from interfering with an ongoing, pending state proceeding. In *NOPSI*, this Court treated the state trial and appeals process as a "unitary system" that could not be interrupted. *NOPSI*, 491 U.S. at 369. Respondents in *NOPSI* argued that the state process from the beginning of the administrative process to the end of all state court appeals should be viewed as a unitary system. *Id.* This Court did not decide that question because it did not need to in that case. However, this case presents that question for decision. In this case, the state proceedings were administrative and summary in nature, and were final and complete at the time of filing the federal lawsuit. As this Court stated in both Huffman and *NOPSI*, Younger's concerns about federalism and comity simply are not present when the state administrative

proceedings have finalized and no state court proceedings have begun. The concerns illustrated in *Younger* of respecting state courts and the ability of state appeals courts to oversee the trial courts are simply not present in this case. The Fourth Circuit's decision was in error. This Court should grant the Petition to correct this error in the important circumstance of federal jurisdiction.

CONCLUSION

For the foregoing reasons, and for the reasons specified in the Petition, Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari.

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